(6)

No. 95-5841

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

MICHAEL A. WHREN and JAMES L. BROWN,

Petitioners,

v.

UNITED STATES

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

A.J. KRAMER
Federal Public Defender
NEIL H. JAFFEE
LISA BURGET WRIGHT*
Asst. Federal Public Defenders
625 Indiana Avenue, N.W.
Suite 550
Washington, D.C. 20004
(202) 208-7500
Counsel for Petitioner Whren

G. ALLEN DALE
307 G Street, N.W.
Washington, D.C. 20001
(202) 638-2900
Counsel for Petitioner Brown

*Counsel of Record

82 pp

QUESTION PRESENTED

Whether a pretextual traffic stop undertaken by plainclothes vice officers who were prohibited by police department regulations from making routine traffic stops was objectively unreasonable under the Fourth Amendment where no reasonable officer in those circumstances would have made such a stop.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

LEGAL TREATISES AND LAW REVIEW ARTICLES

OTHER AUTHORITIES

OPINION BELOW

The opinion of the court of appeals (J.A. 6-19) is reported at 53 F.3d 371 (CADC 1995). The district court's oral ruling (J.A. 4-5) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1995. The court of appeals denied petitioners' timely petition for rehearing on July 13, 1995 (J.A. 20). The petition for a writ of certiorari was filed on August 31, 1995. Certiorari was granted on January 5, 1996 (J.A. 21). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

REGULATION INVOLVED

Also at issue is District of Columbia Metropolitan Police Department General Order 303.1 (Traffic Enforcement) (effective April 30, 1992), which provides, in part (emphasis in original):

A. Objectives and Policies.

> This department's traffic enforcement policies and objectives are as follows:
>
> * * *
>
> 2. Policies.
>
> a. Traffic enforcement action may be taken under the following circumstances:

(1) By on duty uniformed members driving marked departmental vehicles; or

(2) By off duty uniformed members driving marked departmental vehicles while participating in the department's take home cruiser program; or

(3) By on duty uniformed members of the Public Vehicle Enforcement Unit, Traffic Enforcement Branch operating unmarked departmental vehicles; or

(4) Members who are not in uniform or are in unmarked vehicles may take enforcement action only in the case of a violation that is so grave as to pose an immediate threat to the safety of others.[1]

The full text of the General Order on Traffic Enforcement is reprinted as an addendum to this brief.

STATEMENT OF THE CASE

This case arose because the sight of two young black men in a Nissan Pathfinder with temporary tags, pausing at a stop sign in Southeast Washington, D.C., aroused the suspicion of plainclothes

[1] In the court of appeals and in the petition for writ of certiorari, petitioners cited the predecessor to this regulation:

> Only on-duty uniformed members driving marked departmental vehicles or members of the Public Vehicle Enforcement Unit, Traffic Enforcement Branch, shall take enforcement action; except in the case of a violation that is so grave as to pose an immediate threat to the safety of others, in which case members who are off duty, not in uniform, or in unmarked cruisers, may take appropriate enforcement action.

General Order 303.1(I)(A)(2)(a) (effective July 29, 1986). With the exception of the take-home cruiser provision and the emphasis added to the "immediate threat" language, the substance of the reorganized regulation quoted in the text is identical to that relied upon below.

vice officers patrolling for narcotics violations in an unmarked car. The officers decided to stop the Pathfinder and "investigate" why the driver was stopped so long at the stop sign -- ostensibly a violation of the District of Columbia Municipal Regulation requiring drivers to pay "full time and attention" to operating their vehicle. 18 D.C.M.R. § 2213.4 (1995). Turning around to make the stop, one of the officers claimed to see the Pathfinder commit two other minor traffic infractions. Without any intention of issuing a ticket, and in violation of police regulations, the officers then seized the Pathfinder at a stoplight a few blocks away and discovered illegal drugs in plain view.

On July 8, 1993, a federal grand jury indicted the two men, petitioners Michael A. Whren and James L. Brown, on charges of possession with intent to distribute more than 50 grams of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(iii), possession with intent to distribute cocaine base within 1,000 feet of a school in violation of 21 U.S.C. § 860(a), possession of marijuana in violation of 21 U.S.C. § 844(a), and possession of phencyclidine in violation of 21 U.S.C. § 844(a) (J.A. 7).

A. The Suppression Hearing

On October 20, 1993, the district court (Hon. Norma Holloway Johnson) held an evidentiary hearing on the defendants' motions to suppress all evidence seized as a result of the stop of the Pathfinder (Tr. 8-139).[2] The government called two witnesses. The

[2] "Tr." refers to pages of the sequentially numbered transcripts of the suppression hearing (Tr. 1-142) and trial proceedings (Tr. 143-787).

first, Officer Efrain Soto, Jr., described the circumstances leading to the stop of the Pathfinder, the sighting of the drugs, and the arrests (Tr. 8-79). The government limited the testimony of its second witness, Officer Homer Littlejohn, to events after the stop of the Pathfinder (Tr. 81-104). The district court ruled that defense counsel's questions about events leading to the stop were beyond the scope of Officer Littlejohn's direct testimony (Tr. 88-89). The defense then called Officer Littlejohn as its own witness concerning the circumstances surrounding the stop (Tr. 106-120). The evidence at the suppression hearing was as follows:

1. The Decision To Stop the Pathfinder

On June 10, 1993, at 8:25 p.m., Officers Soto and Littlejohn and two or three other plainclothes[3] vice officers were patrolling a "high drug area" (Tr. 117) in an unmarked car (J.A. 8; Tr. 10). The objective of the officers, along with several officers in a second unmarked car with whom they were working (Tr. 10, 61-62), was to "find narcotics activity going on" (J.A. 8; Tr. 22).

As the officers' car turned left off of Ely Place onto 37th Place heading north,[4] Officers Soto and Littlejohn noticed a Nissan Pathfinder with temporary tags at the stop sign where 37th Place ends at a "T"-intersection with Ely Place (J.A. 8; Tr. 11, 26-27).

---

[3] Officer Soto testified that he was wearing his badge on a chain around his neck and an orange arm band (Tr. 14). This attire was consistent with the police regulation governing "casual clothes units." See MPD General Order 308.13(I)(B)(2) & (3) (revised effective December 5, 1986).

[4] The D.C. Circuit's opinion reverses the street references (J.A. 8).

The officers testified that the two occupants were looking down at their laps (J.A. 8; Tr. 11, 113) and that the driver was "not paying full time and attention" to his driving (J.A. 10; Tr. 17, 51, 72). Officer Soto testified that there was at least one car behind the Pathfinder (J.A. 8; Tr. 11, 33, 61) but acknowledged that the driver of that car did not honk or otherwise request the Pathfinder to move (Tr. 61). Officer Littlejohn testified that there were no vehicles waiting behind the Pathfinder (Tr. 114, 115).

As the unmarked car completed its left turn and headed up 37th Place, Officers Soto and Littlejohn continued to watch the Pathfinder (J.A. 8; Tr. 30-31, 34, 112-114). According to Officer Soto, the Pathfinder was at the stop sign for a total of more than twenty seconds (J.A. 8; Tr. 52).[5] At that point, Officer Soto decided to "investigate" -- to inquire of the driver "why did he stay at the stop sign for so long length of a time" (Tr. 11, 17, 50-51, 65). The driver of the unmarked car was already making a U-turn approximately a quarter of a block up 37th Place when Officer Soto asked him to turn the car around and get behind the Pathfinder (J.A. 8; Tr. 11, 54).

2. The Alleged Failure To Signal and Unreasonable Speed Violations

Officer Soto testified that as the unmarked car was making the U-turn, the Pathfinder "sped off quickly, made a right turn [onto

---

[5] Officer Soto was impeached with his testimony at the preliminary hearing that "I don't even know how long they were stopped there" (Tr. 60). Officer Littlejohn never gave a time estimate.

Ely Place] towards Minnesota Avenue" (J.A. 8; Tr. 11).

> Q Let me ask you, when the Pathfinder turned right, did you see if it used a signal?
>
> A It used no hand or mechanical turn signals at all that I can remember it using. And it also -- when I said sped, it sped quickly towards Minnesota Avenue.
>
> Q Was it conforming with the speed limit in that area, if you know?
>
> A It was my opinion it was unreasonable speed.

J.A. 8; Tr. 11-12.[6] At that time it was Officer Soto's intention to pull the Pathfinder over not only to ask the driver why he was stopped so long at the stop sign but also ask him why he was speeding and "simply to warn him" (J.A. 10; Tr. 72-73).[7] Although police department regulations generally prohibit oral "warnings" (even by officers authorized to make a traffic stop),[8] Officer Soto

---

[6] Officer Soto was impeached with his failure to mention not signalling when asked at the preliminary hearing to describe any traffic violations committed by the Pathfinder (Tr. 63-64). Nor was the alleged failure to signal mentioned in the police report on events leading to the stop (Tr. 64-65). Although other officers testified at trial that the Pathfinder was speeding (Tr. 345, 383, 492), Officer Littlejohn never claimed to see either a failure to signal or a speed violation.

[7] Officer Littlejohn, by contrast, did not attempt to justify the stop as a traffic stop. Rather, he claimed to have "reasonable suspicion" (Tr. 116-117):

> [Defense Counsel]: And the reasonable suspicion was that there were drugs; is that correct?
> . . .
> [Littlejohn]: Sir, they were leaving a high drug area. We did not know they had drugs in that vehicle at that time, just had a reasonable suspicion as to their actions as to why they were stopped at the stop sign for so long.

[8] MPD General Order 303.1(I)(A)(2)(b) provides:

> In each instance of a stop for a traffic violation, the member shall:
>
> (1) Issue either a Notice of Infraction (NOI); or
> (2) Issue a Warning NOI; or
> (3) Under extreme circumstances an oral warning may be given (e.g., receipt of a radio assignment requiring immediate response, or the motorist was enroute to a hospital for emergency treatment of a sick or injured passenger).

testified that he did not intend to issue the driver any ticket but simply wanted to "talk to" the driver about the violations (id.):

> The only circumstances that I would issue tickets -- I'm a vice investigator; I'm not out there to give tickets -- is for just reckless, reckless driving, something that in my personal view would somehow endanger the safety of anybody who's walking around the street or even the occupants of a vehicle, maybe children or whoever. . . . I wasn't going to issue a ticket to him at all. That was not my intention at all. My intentions was to pull him over and talk to him [about the full time and attention and speed violations].

Officer Soto's testimony confirmed that he was deviating from standard practice in stopping the Pathfinder at all. He acknowledged that, as a vice officer, he is "out there almost strictly to do drug investigations" and that he pulls people over for making traffic violations "[n]ot very often at all" (Tr. 78).

3. The Seizure of the Pathfinder

The officers caught up to the Pathfinder as it was stopped at the red light at Minnesota Avenue (J.A. 9; Tr. 12). At the stoplight, the Pathfinder was surrounded by several cars in front of it, two cars behind it, and several cars alongside it to the right (J.A. 9; Tr. 11-12, 18-19, 35-36). The unmarked car pulled up parallel to the driver's side of the Pathfinder, facing into and obstructing oncoming eastbound traffic, and pinning the Pathfinder in on all sides (J.A. 9; Tr. 13, 35-38).

4. The Arrests of the Defendants and Seizure of the Drugs

Officer Soto immediately walked towards the driver's side of the Pathfinder, identifying himself as a police officer and ordering the driver to pull over to the right (J.A. 9; Tr. 13-14). Realizing as he reached the Pathfinder that it had nowhere to go on the right, Officer Soto ordered the driver to put the car in park (J.A. 9; Tr. 13). As he was speaking, Officer Soto looked through the driver's window and saw the passenger, Mr. Whren, holding a clear plastic bag of what appeared to be cocaine base in each hand, one bag by his right knee and one bag by his left knee (J.A. 9; Tr. 13-15, 42-43). Officer Littlejohn, who was standing right next to Officer Soto and had the same "vantage point" (Tr. 83, 89-90, 97), testified that Mr. Whren was holding only one bag of cocaine, which he was "displaying" to Mr. Brown with his right hand while his left hand rested on his lap (Tr. 83, 92-94, 98-99, 102-103).

Officer Soto yelled "C.S.A." to alert the other officers that he had seen a Controlled Substances Act violation (J.A. 9; Tr. 74-75). As he reached for the driver's door, he heard the passenger tell the driver to "pull off, pull off" and saw the passenger pull the cover off a panel on the passenger door and put the plastic bag he had in his right hand inside a hidden compartment (J.A. 9; Tr. 14-15). Officer Soto testified that he then opened the door, "dove" across Mr. Brown, and grabbed the other plastic bag from Mr. Whren's left hand (J.A. 9; Tr. 15, 43-45).[9] Officer Littlejohn

[9] Officer Littlejohn said he saw Officer Soto seize the bag from Mr. Whren's right hand (Tr. 94-95).

pinned Brown against the driver's seat (J.A. 9; Tr. 101). "[M]ultiple" officers came to their assistance (J.A. 9; Tr. 15, 45),[10] and Mr. Whren and Mr. Brown were placed under arrest (J.A. 9; Tr. 15, 84). The officers searched the Pathfinder, finding a plastic bag of cocaine base and a loose rock of cocaine base in the compartment in the passenger door and two tinfoils of marijuana laced with PCP on the console between the seats (J.A. 9-10; Tr. 16, 84-86).

5. The District Court's Ruling

Judge Johnson denied the motion to suppress (J.A. 4-5):

> Now, it is absolutely true, anyone who has heard the testimony here today knows that not every item of evidence was indeed consistent. There were differences indicated and there were efforts made to demonstrate that the evidence might not be truthful. But when I review all of the evidence as a whole, it is clear to me that notwithstanding certain differences between Officer Littlejohn and Officer Soto, for the most part, all of the evidence is consistent, and the one thing that was not controverted, and that to me was important, is the facts surrounding the stop. There may be different ways in which one can interpret it but, truly, the facts of the stop were not controverted. There was nothing to really demonstrate that the actions of the officers were contrary to a normal traffic stop. It may not be what some of us believe should be done, or when it should be done, or how it should be done, but the facts stand uncontroverted and the Court is going to accept the testimony of Officer Soto.
>
> I was indeed concerned primarily with the manner in which he responded to a question more more so than his response to that question.[11] But I do believe that the

[10] The trial record indicates there were nine or ten officers in the two unmarked cars (Tr. 279, 287, 486-487).

[11] The court had been concerned by the "lengthy pause" before Officer Soto answered "no" to the following question from Mr. Brown's counsel (Tr. 66-67):

> government has demonstrated through the evidence presented that the police conduct was appropriate and therefore, there is no basis to suppress the evidence. And it is so ordered. The motions to suppress will be denied.

B. The Trial And Sentences

Mr. Whren's and Mr. Brown's trial began the next day (J.A. 2).[12] On October 28, 1993, the jury found the defendants guilty on all counts (J.A. 2, 11). On January 26, 1994, Mr. Whren was sentenced to 168 months in prison, a term of supervised release, and a fine of $8800 (J.A. 11). On February 9, 1994, Mr. Brown was sentenced to 168 months in prison and a term of supervised release (J.A. 11).

C. The D.C. Circuit's Decision

The D.C. Circuit affirmed the denial of the motions to suppress. The court of appeals explicitly rejected the contention that a stop justified on the basis of traffic violations is reasonable "only if 'under the same circumstances a reasonable officer would have made the stop'" absent another purpose. J.A. 13

> Q . . . [I]sn't it true that your decision to stop that Pathfinder was because you believed that two young black men in a Pathfinder with temporary tags were suspicious; isn't that true?

When the court asked Officer Soto why he had "hestitate[d] a long time" before answering that "very straightforward question," Soto stated that he had "wanted to really think" and "analyze the question" (Tr. 75-76). He denied basing the stop on any "racial profile" (Tr. 76-77).

[12] There was more testimony at trial about the stop. Mr. Whren renewed his motion to suppress at the close of the government's case, but the court, calling the trial testimony "additional evidence but not new evidence," declined to revisit the issue (Tr. 439-41).

(quoting United States v. Smith, 799 F.2d 704, 709 (CA11 1986) (emphasis added by D.C. Circuit)). Instead, the court adopted the so-called "could have" test for allegedly pretextual traffic stops: "[A] traffic stop is permissible as long as a reasonable officer in the same circumstances could have stopped the car for the suspected traffic violation." J.A. 16 (emphasis in original). The court concluded that a traffic stop is always "reasonable" if an officer believes he has observed a traffic violation: "When a police officer observes a traffic violation, his subsequent stop of the vehicle is reasonable because it is supported by probable cause." J.A. 19.[13] The court therefore ruled the stop in this case justified based on three civil traffic infractions described in Officer Soto's testimony: Mr. Brown failed to give "full time and attention" to his driving (18 D.C.M.R. § 2213.4), turned without signalling (id. at § 2204.3), and drove away at an "unreasonable"

---

[13] Eight other circuits have adopted some form of the "could have" test. See United States v. Botero-Ospina, 71 F.3d 783, 787 (CA10 1995) (en banc); United States v. Johnson, 63 F.3d 242, 247 (CA3 1995), petition for cert. filed, No. 95-6724 (Nov. 13, 1995); United States v. Scopo, 19 F.3d 777, 782-84 (CA2), cert. denied, 115 S. Ct. 207 (1994); United States v. Ferguson, 8 F.3d 385, 389-91 (CA3 1993) (en banc), cert. denied, 115 S. Ct. 97 (1994); United States v. Hassan El, 5 F.3d 726, 729-30 (CA4 1993), cert. denied, 114 S. Ct. 1374 (1994); United States v. Cummins, 920 F.2d 498, 500-01 (CA8 1990), cert. denied, 502 U.S. 962 (1991); United States v. Trigg, 878 F.2d 1037, 1039 (CA7 1989), cert. denied, 502 U.S. 962 (1991); United States v. Causey, 834 F.2d 1179 (CA5 1987) (en banc).

The Ninth and Eleventh Circuits apply the "would have" test. United States v. Cannon, 29 F.3d 472, 475-76 (CA9 1994); United States v. Smith, 799 F.2d 704, 709 (CA11 1986). See also, e.g., Alejandre v. State, 903 P.2d 794, 796-97 (Nev. 1995); State v. Daniel, No. 84486, 1995 WL 568723, *1-*4 (Sept. 28, 1995); State v. Izzo, 623 A.2d 1277, 1280 (Me. 1993).

speed (id. at § 2200.3). J.A. 17.

The defendants had argued that the stop was unreasonable in that it was made by plainclothes vice officers in an unmarked car in violation of police regulations. But the court of appeals found it irrelevant that the officers who made the stop were plainclothes vice officers patrolling for narcotics violations, rejecting any standard that would make traffic stops "'subject to the vagaries of police departments' policies and procedures.'" J.A. 17-18 (quoting United States v. Ferguson, 8 F.3d 385, 392 (CA6 1993) (en banc), cert. denied, 115 S. Ct. 97 (1994)). "When they observed a traffic violation, they, as officers of the law, were constitutionally justified in stopping [the defendants]." J.A. 18.[14]

SUMMARY OF ARGUMENT

The Fourth Amendment forbids "unreasonable" seizures. In adopting the "could have" test, the court of appeals held that even a pretextual traffic stop is per se reasonable whenever a police officer has probable cause of any traffic violation, no matter how minor, and no matter how far the stop deviates from standard police practice. This rule ignores the "essential purpose" of the Fourth Amendment's "reasonableness" requirement: "'"to safeguard the privacy and security of individuals against arbitrary invasions . . ."'" Delaware v. Prouse, 440 U.S. 648, 653-54 (1979) (citations omitted).

Given the ease with which an officer so inclined can identify technical traffic infractions, merely limiting stops to those circumstances in which the police can say they have witnessed such a violation is, as a practical matter, no limitation at all. A string hanging from the rearview mirror, a tire touching the shoulder stripe, a lane change signal a moment too brief, or a pause at a stop sign to look at a map, are all unquestionable grounds for seizure under the "could have" test. In reality, the universe of persons subject to seizure under the D.C. Circuit's rule is the same universe of persons subject to seizure for spot license checks in Prouse -- all motorists. In Prouse, this Court rejected such unfettered discretion even where the state considered its spot-check program necessary to the promotion of traffic safety. The D.C. Circuit's rule allows such discretion in circumstances where -- measured by the established practices of the police themselves -- the intrusion is completely unnecessary to promote traffic safety. Indeed, the stop upheld in this case affirmatively violated police traffic safety regulations.

If any civil traffic infraction always will justify any stop of any driver, no matter how far removed the stop is from standard police practice, such infractions are subject to abuse by officers looking for a pretext to evade otherwise applicable Fourth Amendment limits. In fact, under the "could have" test, such use of the traffic laws is not an "abuse" at all; it is just part of

---

[14] The court remanded for resentencing because the convictions for possession with intent to distribute were lesser-included offenses of the convictions for possession with intent to distribute within 1,000 feet of a school (J.A. 18-19). On remand, the district court vacated the lesser-included convictions and reimposed the original sentences on the remaining counts (except that Mr. Whren was sentenced to no fine) (J.A. 2). Consolidated appeals of the resentencings are being held in abeyance pending this Court's decision.

the game. Unfortunately, all the evidence indicates that not everyone gets the same odds. Data from pretextual traffic enforcement programs shows, for example, that the individuals singled out for arbitrary enforcement on the basis of inarticulable hunches of some greater crime are disproportionately minorities. Not surprisingly, the "hit" rate for stops based on less than reasonable suspicion is extremely low, meaning that thousands of innocent motorists may be arbitrarily stopped based on the color of their skin or other improper criteria.

To be sure, subjective motive is not controlling, and many pretextual traffic stops do not violate the Fourth Amendment. "[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken, as long as the circumstances, viewed objectively, justify that action." Scott v. United States, 436 U.S. 128, 138 (1978). But it is one thing to say that a stop that a reasonable officer would have made on the objective basis asserted is not rendered unconstitutional merely because the officer who actually made the stop had an additional, or even an entirely different, subjective motivation. It is quite another to say that "the circumstances, viewed objectively, justify [the] action" where, as here, no reasonable officer in those circumstances would have taken that action on the objective basis asserted. The "could have" test puts the Fourth Amendment stamp of approval on all pretextual traffic stops. In contrast, the "would have" standard urged by

petitioners merely recognizes that there are some circumstances under which it is not objectively reasonable to stop a car for a trivial traffic violation. By judging police conduct by what would be expected of a "reasonable officer," this standard does no more than hold the police to the classic Fourth Amendment test of reasonableness.

To endorse unlimited discretion in enforcement of civil traffic laws, even to the extent of upholding traffic stops that the police department's own regulations affirmatively forbid, would be to endorse an entirely sham system of "traffic enforcement." The D.C. Circuit's ruling encourages the police to use arbitrary enforcement of the civil traffic laws as a law enforcement strategy by rewarding the police with convictions for criminal violations on the few occasions when their unsupported hunches produce a "hit," while innocent motorists pay the price of all the officers' arbitrary "misses." Such a system only breeds public cynicism and disrespect for the police. The Fourth Amendment entitles citizens to expect their police to act "reasonably." That standard was not met here.

ARGUMENT

I. BY ALLOWING MERE OBSERVATION OF ANY TECHNICAL TRAFFIC "VIOLATION" TO JUSTIFY ANY PRETEXTUAL TRAFFIC STOP, THE D.C. CIRCUIT'S RULE FAILS TO PREVENT ARBITRARY AND UNREASONABLE SEIZURES.

A. The Essential Purpose of the Fourth Amendment Is to Safeguard Our Privacy Against Arbitrary Invasions.

"The security of one's privacy against arbitrary intrusion by the police -- which is at the core of the Fourth Amendment -- is

basic to a free society . . . " Wolf v. Colorado, 338 U.S. 25, 27 (1949). Indeed, "[t]he essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order '"to safeguard the privacy and security of individuals against arbitrary invasions . . . . "'" Delaware v. Prouse, 440 U.S. 648, 653-54 (1979), quoting Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978), quoting Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

According to the D.C. Circuit, a vehicle stop is "reasonable" whenever it is "supported by probable cause" to believe a traffic violation has occurred (J.A. 19). But the observation of a traffic violation does not automatically end the reasonableness inquiry. After all, the requisite degree of objective individualized suspicion (whether probable cause or a less stringent standard) is only the "minimum" that "the reasonableness standard usually requires." Prouse, 440 U.S. at 654 (emphasis added).

This Court has often looked beyond the mere existence of probable cause in evaluating the reasonableness of searches and seizures. In Wilson v. Arkansas, 115 S. Ct. 1914 (1995), for instance, the Court held that an officer's unannounced entry into a home may be unreasonable under the Fourth Amendment even when the police have probable cause and a warrant. Tennessee v. Garner, 471 U.S. 1 (1985), held that the use of deadly force to effect a seizure for a nonviolent crime was unreasonable even though there was probable cause for an arrest. Similarly, in Winston v. Lee,

470 U.S. 753 (1985), the Court held that even though there was probable cause, a search for a bullet lodged in a suspect's body was unreasonable based on a weighing of the intrusion against the government's need for the evidence.[15] Finally, Welsh v. Wisconsin, 466 U.S. 740, 754 (1984), holds that even where there is probable cause (and even where evidence would be lost by waiting to obtain a warrant) a warrantless entry into a suspect's home to make an arrest for a civil traffic offense is "unreasonable police behavior."

Given the exceedingly broad discretion provided the police by the existence of hundreds of minor traffic regulations, "reasonableness" in this context requires more than the "minimum" of individualized suspicion of a "violation." The Fourth Amendment serves a "discretion control function" independent of its interest-balancing role: "Even when the governmental interest at stake might otherwise justify a search or seizure, that search or seizure may be illegal if allowing it would confer too broad a discretionary authority on the police." William J. Mertens, The Fourth Amendment and the Control of Police Discretion, 17 J. L. Ref. 551, 553 (1984). The Fourth Amendment is concerned not just with "unjustified" seizures, but also with "arbitrary" seizures "conducted at the discretion of executive officials, who may act despotically and capriciously in the exercise of the power to

---

[15] See also Schmerber v. California, 384 U.S. 757 (1966) (notwithstanding probable cause and exigent circumstances to obtain blood sample, Court considered manner in which blood was extracted in determining reasonableness of search).

search and seize"; it "condemns the petty tyranny of unregulated rummagers." Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 411 (1974) (hereinafter "Amsterdam").

B. Because the Police Always Can Allege a Breach of a Minor Civil Traffic Regulation, Unrestrained Authority to Seize Motorists on that Basis Does Not Limit Police Discretion.

The court of appeals acknowledged petitioners' "legitimate concerns regarding police conduct" but concluded that the requirement that the police have probable cause of a traffic violation or reasonable suspicion of unlawful conduct before effecting a traffic stop properly "restrain[s] police behavior." J.A. 17. This protection is illusory. As a practical matter, the probable cause test applied by the D.C. Circuit, while simple, subjects motorists "to unfettered governmental intrusion every time [they] ente[r] an automobile." Prouse, 440 U.S. at 663.

Prouse definitively laid to rest the notion that officers were free to single out motorists on any basis whatsoever and stop them on the spot. But the "could have" test allows officers to single out the very same motorists, follow them until the officers catch them in violation of some subsection of the traffic code -- no matter how minor or seldom-enforced -- for which no reasonable officer in those circumstances would effect a stop, and then stop them.[16]

---

[16] For example, in United States v. Laymon, 730 F. Supp. 332 (D. Colo. 1990), a local sheriff's department officer assigned to a DEA-funded drug task force, was travelling in an unmarked car on Interstate 70 when he observed a car with out-of-state plates. Consistent with his pattern of stopping out-of-state cars (188 out

> [G]iven the pervasiveness of such minor offenses and the ease with which law enforcement agents may uncover them in the conduct of virtually everyone, [the requirement of a traffic violation] hardly matters, for . . . there exists 'a power that places the liberty of every man in the hands of every petty officer,' precisely the kind of arbitrary authority which gave rise to the Fourth Amendment.

1 W. LaFave, Search and Seizure § 1.4(e) at 123 (3d ed. 1996), quoting 2 L. Wroth & H. Zobel, Legal Papers of John Adams 141-42 (1965). Because virtually "every man" can be caught in a minor traffic infraction, the decision below places "every man" at the risk of arbitrary seizure.

For example, recent data shows that almost half of all vehicles monitored were violating the 55 mile per hour speed limit (71% on urban interstates and 80% on rural interstates). U.S. Dept. of Transportation, National Maximum Speed Limit -- Fiscal Year 1993: Travel Speeds, Enforcement Efforts, and Speed-Related Highway Safety Statistics at Tables 1 & 3 (Oct. 1995). These noncompliance rates are not surprising given the "traditional five mph enforcement 'tolerance' in most states." Id. at Table 1. See also H.R. Rep. No. 171(I), 102nd Cong., 1st Sess. 32 (1991), reprinted in 1992 U.S.C.C.A.N. 1526, 1558 ("the average motorist expects a 5 to 10 mile per hour tolerance by law enforcement personnel"). While the common practice of exceeding the posted limit (at least by one or two miles per hour) is not to be

---

of 200 stops over a nine-month period), the officer followed the car and observed it gradually edge toward the right until the right front tire ultimately contacted the white shoulder stripe, at which point he pulled it over for "weaving." This stop, which was held invalid under the "would have" test, would easily have passed the "could have" test.

applauded, it is a reality that is not affected by sporadic and arbitrary stops of a handful of motorists. Cf. Prouse, 440 U.S. at 660 (doubting deterrence value of random license checks).

If speed monitors are able to catch almost half the population violating just one regulation, the universe of drivers subject to seizure in a world where the police have a one-inch thick book of traffic regulations with which to work must approach 100%. After all, one can also be stopped for driving too slowly, 18 D.C.M.R. § 2200.10, or even for driving precisely the speed limit if a police officer deems that speed "greater than is reasonable and prudent under the conditions" (id. at § 2200.3). And at any given moment, surely thousands of drivers in Utah are signalling for only two seconds, rather than the required three, before changing lanes. See Utah Code Ann. 41-6-69. Indeed, "driv[ing] in accordance with all traffic regulations" is apparently so unusual that some officers consider it suspicious and have attempted to use it as a factor in a "drug courier profile." See United States v. Smith, 799 F.2d 704, 707 (CA11 1986).

This case is a classic example of just how easy it is for police officers to find a "violation" of a civil traffic provision. The court of appeals concluded that one proper basis for this stop was Mr. Brown's violation of 18 D.C.M.R. § 2213.4, under which an operator "shall, when operating a vehicle, give full time and attention to the operation of the vehicle." J.A. 17.[17] Armed with

[17] In Ziegler v. District of Columbia, 71 A.2d 618 (D.C. 1950), the local appellate court rejected the argument that the regulation was improperly vague and ambiguous and interpreted its scope quite broadly (id. at 620):

> [W]e think the regulation is understandable and sufficiently definite to inform a motorist of the duties required by it. . . . The [regulation] . . . was directed at any diversion of the driver's attention. One's attention can be as easily diverted by something outside the car or by one's own thoughts as by a passenger or tangible object within the car.

the "full time and attention" regulation and the "could have" Fourth Amendment standard, an officer could stop any car, at any time, on any improper basis, simply by waiting for the driver to change the radio station, speak to a passenger, read a roadside billboard, glance at his watch, or pause briefly at a stop sign to look down at directions or consult a roadmap.[18] With traffic laws this subjective and nitpicking at police disposal, the probable cause standard alone is ineffective to limit police discretion.

Police are well aware of this reality. The American Bar Foundation's Survey of the Administration of Criminal Justice in the United States reported the following statements by police officers:

> You can always get a guy legitimately on a traffic violation if you tail him for a while, and then a search can be made.
>
> You don't have to follow a driver very long before he will move to the other side of the yellow line and then you can arrest and search him for driving on the wrong side of the highway.
>
> In the event that we see a suspicious automobile or

[18] In a different context, such strict enforcement of a "full time and attention" requirement might be perfectly reasonable. Cf. Guide For Counsel In Cases To Be Argued Before The Supreme Court Of The United States at 10 (October Term 1995) (defining the phrase "full time and attention" during oral argument as "not look[ing] down at your notes and . . . not look[ing] at your watch").

> occupant and wish to search the person or the car, or both, we will usually follow the vehicle until the driver makes a technical violation of a traffic law. Then we have a means of making a legitimate search.

L. Tiffany, D. McIntyre & D. Rotenberg, Detection of Crime 131 (1967).

C. Unlimited Discretion To Stop for Trivial Traffic Infractions Invites Police To Abuse That Discretion To Evade Fourth Amendment Constraints.

"The dangers of abuse of a particular power are, certainly, a pertinent consideration in determining whether the power should be allowed in the first instance." Amsterdam, 58 Minn. L. Rev. at 435. The danger of abuse of minor traffic laws grows out of two characteristics of automobiles: 1) they are mobile; and 2) their use is regulated to the point that it is impossible to operate them in strict conformity with each and every applicable regulation. Unlike pedestrians, whom the police frequently approach and seek to interview consensually without a Fourth Amendment seizure, see, e.g., Florida v. Royer, 460 U.S. 491, 497 (1983), it is not physically possible (or at least not very safe) to drive alongside and request a consensual interview with a motorist inside a moving automobile. If an officer wants to "check out" a motorist for some reason short of reasonable suspicion of wrongdoing, he has a tremendous incentive to find a way to evade the bar the Fourth Amendment would otherwise impose to stopping the car. The combination of this temptation and the ease with which officers can identify civil traffic infractions creates the phenomenon of the pretextual traffic stop -- the use of traffic laws to evade constitutional restraints.

If police are not required to exercise their discretion within the confines of standard police procedure, the decision whether to stop a particular citizen for a particular minor traffic infraction will turn on no more than "the price of our automobiles, the formality of our dress, the shortness of our hair or the color of our skin." Amsterdam, 58 Minn. L. Rev. at 416. The "poorly reasoned decisions" upholding stops without regard to whether they conform to reasonable police practice "have conferred upon the police virtual carte blanche to stop people because of the color of their skin or for any other arbitrary reason." 1 W. LaFave, Search and Seizure § 1.4(e) at 121-122 (3d ed. 1996). Even some circuit judges who have joined in the "could have" rule have recognized the inherent risk that "some police officers will use the pretext of traffic violations or other minor infractions to harass members of groups identified by factors that are totally impermissible as a basis for law enforcement activity -- factors such as race or ethnic origin, or simply appearances that some police officers do not like, such as young men with long hair, heavy jewelry, and flashy clothing." United States v. Scopo, 19 F.3d 777, 785-86 (CA2 1994) (Newman, C.J., concurring), cert. denied, 115 S. Ct. 207 (1994).[19]

---

[19] Appendix A to the Brief for Respondent in Delaware v. Prouse, No. 77-1571, contains a wealth of social science research explaining "'the general inclination to place a person in categories according to some easily and quickly identifiable characteristic such as age, sex, ethnic membership, nationality, or occupation, and then to attribute to him the qualities believed to be typical of members of that group.'" Id. at 1a (citation omitted). "The conclusion reached by all of the relevant literature, in short, is that police officers' behavior will

There can be little doubt that this risk is real.

> As the old adage warns, the more things change, the more they remain the same. In Montgomery, Alabama, on January 26, 1956, police officers arrested and jailed Dr. Martin Luther King, Jr. for allegedly driving thirty miles per hour in a twenty-five mile per hour zone. [citation omitted] Today, everyone readily acknowledges the police officers stopped, arrested, jailed and harassed Dr. King because he was an African-American and because he actively and vigorously sought equal protection and equal treatment for African-Americans.

United States v. Harvey, 16 F.3d 109, 114 (CA6) (Keith, J., dissenting), cert. denied, 115 S. Ct. 258 (1994). Such practices are, unfortunately, still with us. In the Harvey case, for example, a police officer testified that he stopped the defendant's car in part because it fit his own personal drug trafficker profile: "There were three young black male occupants in an old vehicle." Similarly in State v. Arroyo, 796 P.2d 684, 688 (Utah 1990), the Utah Supreme Court cited a state trooper's admission that "[a]s a result [of] training at [a] seminar, . . . whenever he observed an Hispanic individual driving a vehicle he wanted to stop that vehicle" and that "once he stopped an Hispanic driver, 80% of the time he requested permission to search the vehicle."

Although courts generally see only the few "hits" that result from a policy of stopping vehicles based on a "hunch" of illegal activity plus a technical traffic violation, such a policy in fact results in the seizure of thousands of innocent motorists who, but

---

reflect their biases when the officers are given free rein." Id. at 9a. One experiment, for example, involved having 15 college students with clean driving records affix "Black Panther" bumper stickers to their cars and go about their normal commuting patterns. In 17 days, they had accumulated 33 traffic citations. Id.

for the unreasonable suspicion of the officer, would never have been stopped. "What appears to be a police officer's magical 'sixth sense' in a criminal case arising from a successful interdiction is, in reality, the inevitable and often isolated positive result of a search that was based on nothing more than a hunch." David Rudovsky, The Impact of the War on Drugs on Procedural Fairness and Racial Equality, 1994 U. Chi. Legal F. 237, 248 (1994) (hereinafter "Rudovsky"). Justice Jackson's observation nearly a half-century ago is no less true today: "I am convinced that there are . . . many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear." Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting).

Because police do not generally keep records of traffic stops that turn up nothing and in which no one is ticketed, it is no simple matter to substantiate Justice Jackson's suspicions. However, reporters from the Orlando Sentinel had the unique opportunity to document this phenomenon when they obtained 148 hours of videotaped "traffic" stops of 1,084 motorists along Interstate 95 in Florida. Brazil and Berry, Color of Driver is Key to Stops in I-95 Videos, Orlando Sentinel, Aug. 23, 1992, at A1. Although all of the stops were purportedly based on traffic violations,[20] only 9 drivers (less than one percent) were issued

---

[20] Twenty-three percent of the stops were for alleged "swerving"; twenty-two percent were for "following too closely"; twelve percent were for speeding 1-10 mph over the limit; seven

citations. Searches were made in almost half the stops, but only five percent of all stops resulted in an arrest. Id.[21] Most shocking is how racially disproportionate the stops were. Although blacks and Hispanics made up only five percent of the drivers on that stretch of I-95 and only fifteen percent of traffic convictions statewide,[22] approximately seventy percent of those stopped were black or Hispanic. Id. On average, stops of minority drivers lasted more than twice as long as stops of white drivers. Id. For some, the tapes showed it was not the first time they had been singled out: "There is the bewildered black man who stands on the roadside trying to explain to the deputies that it is the seventh time he has been stopped. And the black man who shakes his head in frustration as his car is searched; it is the second time in minutes he has been stopped." Id. This kind of baseless "checking out" of racial minorities generally gets public attention

---

percent were for having a burned out license tag light; and four percent were for failure to signal a lane change. Id.

[21] This low "hit" rate is consistent with other empirical data on the success rate of contacts based on less than reasonable articulable suspicion. See, e.g., Florida v. Bostick, 501 U.S. 429, 442 (1991) (Marshall, J., dissenting) (approaches during sweep of 100 buses in North Carolina resulted in only seven arrests) (citation omitted); United States v. Hooper, 935 F.2d 484, 500 (CA2) (Pratt, J., dissenting) (although two agents approached 600 persons in Buffalo airport in 1989 based on DEA drug courier profile, "their hunches that year resulted in only 10 arrests" -- a 98% "miss" rate), cert. denied, 502 U.S. 1015 (1991).

[22] Curtis, Statistics Show Pattern of Discrimination, Orlando Sentinel, Aug. 23, 1992, at A11.

only when someone well-known speaks out.[23]

Discovery materials in a class action involving pretextual traffic stops along Interstate 95 near Philadelphia show a similar pattern. The class representatives alleged that, while returning from a church celebration in 1991, they were stopped and subjected to a sniff by a police dog before being told, "[i]n order to make this a legitimate stop, I'm going to give you a warning for obstruction of your car's rear-view mirror." Wilson v. Tinicum Township, 1993 WL 280205 (E.D. Pa. July 20, 1993) (certifying class). The only object hanging from the mirror was a thin piece of string on which an air freshener had once been attached. When the driver pointed out that the officer could not have seen the string, the officer stated that they were stopped "because you are young, black and in a high drug-trafficking area, driving a nice car." Id. Discovery materials and follow-up interviews in the Tinicum Township case showed:

> First, the interdiction program is based on the power to make a pretextual traffic stop. Numerous vehicles have been stopped, for example, for having small items tied to their rearview mirrors, for outdated inspection stickers, or for other minor violations, all supposedly observed as the car passed the police at sixty miles per hour.

---

[23] See Aldridge, A Team's True Colors, The Washington Post, Dec. 16, 1995, at A1 (quoting defensive tackle William Gaines on commuting between Redskin Park and suburban Virginia: "Being a black American, . . . [y]ou're more [likely] to see it than a white American would. Because I've been pulled over here a couple of times in my truck, doing the speed limit. Just riding on 66 or whatever. Once they pulled me over, though, they didn't give me any trouble. They checked to make sure it was my truck. . . . I guess because I had my truck fixed up, they thought maybe it was a drug thing or whatnot.")

> Second, the stops are racially disproportionate.[24] Third, claims of consent are rebutted by numerous innocent individuals who give consistent accounts of being told that they would have to wait for a police dog, have their car towed, or suffer other types of roadside detention unless they consented to a search.

Rudovsky, 1994 U. Chi. Legal F. at 250 (footnotes omitted).

The experience in Eagle County, Colorado, also shows that officers will not hesitate to use "traffic" stops to effect otherwise unconstitutional racial profile stops. In United States v. Laymon, 730 F. Supp. 332 (D. Colo. 1990), discussed supra at ___ n.16, Sergeant James Perry and other members of a drug task force testified that race was a factor in their drug courier profile. Id. at 337. Perry further testified that when the District Attorney refused to file charges in one of his "profile" stop cases, he learned that such profiling was unconstitutional, and he stopped using that technique (id.):

> [Perry] claimed that his entire practice as a Drug Task Force officer changed and that he would no longer simply stop people because they were Black or Hispanic with out-of-state plates. . . . After [that], Perry's activity logs markedly changed. His [earlier] logs are filled with the notation "CI" meaning "criminal investigation" as the reason for the stop. . . . After the [unconstitutional] arrest, Perry entered "TE" . . . for "traffic enforcement."
>
> If Perry's own records are to be construed literally, Perry went from being a Drug Task Force officer who went for days at a time without ever concerning himself with any traffic violations, to a drug enforcement officer obsessed with traffic enforcement. The logs, however, reflect that Perry's routine was unaffected by his sudden passion for traffic enforcement. He still stopped approximately the same number of vehicles . . . and his

[24] In stops for which records indicated the race of the driver, more than sixty percent of the drivers were members of racial minorities. Id. at 250 n.81.

> primary focus remained on out of state vehicles. His consent forms continued to be signed by a disproportionately high percentage of Spanish surnamed people.

The district court ultimately ruled that the "profile" originally used by the task force (the only "indicators" of which that could be observed at interstate highway speeds were the race of the occupants, out-of-state plates, darkened windows, a temporary CB antenna, a radar detector, and an indication that the vehicle was rented) violated the Fourth Amendment. Whitfield v. Board of County Commissioners, 837 F. Supp. 338, 340, 343-344 (D. Colo. 1993). Because the Tenth Circuit has now abandoned the "would have" test in favor of a test that allows stops upon reasonable suspicion of any traffic or equipment violation, see United States v. Botero-Ospina, 71 F.3d 783 (CA10 1995) (en banc), officers in Colorado will no longer have to concern themselves with whether such profiles amount to reasonable suspicion of a crime. They can simply rely on the civil traffic laws to justify all of their vehicle stops, no matter how far a particular stop deviates from established traffic enforcement practice. Officer Perry's transparent technique of changing his stops from "CI" stops to "TE" stops -- struck down under the "would have" test in Laymon -- will pass unchallenged.

Experience in the Fifth Circuit illustrates the way the "could have" test insulates such police abuse from judicial review. In United States v. Roberson, 6 F.3d 1088, 1092 (CA5 1993), cert. denied, 114 S. Ct. 1322 (1994), a Texas state trooper passed a van with out-of-state plates and four black occupants. The trooper

crested a hill, pulled to the shoulder and doused his lights. When the van -- the only other vehicle on that stretch of road -- changed lanes without signalling, he stopped the van, obtained consent to search, and found drugs. The Fifth Circuit noted that "[t]he record entices, but does not compel the conclusion that Trooper Washington purposefully precipitated the lane change by positioning his vehicle to force the van to change lanes on short notice." Id. at 1092 n.10.

The Fifth Circuit also noted the arresting officer's "remarkable record" for warrantless drug arrests after traffic stops -- about 250 of them in five years. "Indeed, this court has become familiar with Trooper Washington's propensity for patrol[l]ing the fourth amendment's outer frontier." Id. Given the abysmal "hit rate" of stops like these, see supra at __, it is troubling to imagine how many innocent motorists Trooper Washington must have stopped -- and what criteria he used to choose them -- to net 250 drug possessors. Yet, citing the sharply divided en banc decision in United States v. Causey, 834 F.2d 1179 (CA5 1987), the Fifth Circuit concluded that its hands were tied (id.):

> Hence, while we do not applaud what appears to be a common practice of some law enforcement officers to use technical violations as a cover for exploring more serious violations, we may look no further than the court's finding that Trooper Washington had a legitimate basis for stopping the van.

See also Johnson, 63 F.3d at 247 (CA3 1995) (accepting "abus[e] [of pretextual stop rules] by the authorities" as "inherent in the nature of law enforcement"). This Court need not, and should not, accept such abuse as consistent with the Fourth Amendment where it

results in an intrusion that would not otherwise have been made.

II. THIS COURT'S PRECEDENTS SUPPORT THE RULE THAT A SEIZURE BASED ON A MINOR TRAFFIC INFRACTION IS "UNREASONABLE" IF A REASONABLE OFFICER IN THE SAME CIRCUMSTANCES WOULD NOT HAVE MADE IT.

This Court has consistently spoken out against pretextual use of government authority. In Florida v. Wells, 495 U.S. 1, 4 (1990), the Court reaffirmed that "an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence." Similarly, in United States v. Bertine, 479 U.S. 367, 372 (1987), the Court emphasized that "there was no showing that the police, who were following standardized [inventory] procedures, acted in bad faith or for the sole purpose of investigation." The Court in New York v. Burger, 482 U.S. 691, 716-17 n.27 (1987), was likewise careful to point out that "[t]here is . . . no reason to believe that the instant [administrative junkyard] inspection was actually a 'pretext' for obtaining evidence of respondent's violation of the penal laws." The Court in Colorado v. Bannister, 449 U.S. 1, 4 n.4 (1980) upheld seizure of contraband in plain view from a car stopped for a traffic violation, noting: "There was no evidence whatsoever that the officer's presence to issue a traffic citation was a pretext to confirm any other previous suspicion about the occupants." Even the dissent in Prouse argued that the license checks in that case were "quite different from a random stop designed to uncover violations of laws that have nothing to do with motor vehicles." 440 U.S. at 665 (Rehnquist, J., dissenting).

Of course, the Court has also made clear that not all pretextual actions are "unreasonable." Objectively justified

seizures are permissible under the Fourth Amendment without regard to the subjective motivations of the police: "[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken, as long as the circumstances, viewed objectively, justify that action." Scott v. United States, 436 U.S. 128, 138 (1978) (emphasis supplied). The question that has divided the lower courts is what standard of objective justification applies when the defendant alleges that the asserted basis for a search or seizure was a pretext to evade applicable Fourth Amendment constraints. Although this Court has never had to decide that question, its precedents and the purposes of the Fourth Amendment support the rule that such intrusions are unreasonable if they deviate so far from standard police practices that a reasonable officer in the same circumstances would not have made the intrusion on the basis asserted. This standard prohibits arbitary intrusions without "immunizing" defendants suspected of greater crimes from stops that would otherwise have been made.

This Court's reluctance to attempt to pin down the subjective motivations of the police who actually made an intrusion makes sense, and the standard urged here does not require any finding of subjective motivation. As Justice White once put it: "[S]ending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of resources." Massachusetts v. Painten, 389 U.S. 560, 565 (1968) (White, J., dissenting).

> [S]urely the catch is not worth the trouble of the hunt when courts set out to bag the secret motivations of policemen in this context. A subjective purpose to do something that the applicable legal rules say there is sufficient objective cause to do can be fabricated all too easily and undetectably. Motivation is, in any event, a self-generating phenomenon: if a purpose to search for heroin can legally be accomplished only when accompanied by a purpose to search for a weapon, knowledgeable officers will seldom experience the first desire without a simultaneous onrush of the second.

Amsterdam, 58 Minn. L. Rev. at 436-437.

The court below -- like several of the "could have" courts -- misunderstood the test urged by petitioners when it reasoned that the "objective 'could have' standard" is better than the "open-ended 'would have' standard" because it "eliminates the necessity for the court's inquiring into an officer's subjective state of mind." J.A. 16-17, citing Maryland v. Macon, 472 U.S. 463, 470-471 (1985). The "would have" test is also a purely objective standard, looking at the objective circumstances through the eyes of a "reasonable officer," not at the subjective state of mind of the particular officer who made the stop. United States v. Cannon, 29 F.3d 472, 476 (CA9 1994); United States v. Smith, 799 F.2d 704, 710 (CA11 1986) ("would have" test focuses on "objective reasonableness rather than on subjective intent or theoretical possibility").

As a leading advocate of the "would have" approach has pointed out, focusing the inquiry on arbitrariness -- whether an officer's actions deviated from the usual practice in such a case -- is fully consistent with Scott's "objective reasonableness" test:

> [T]he proper basis of concern is not with why the officer deviated from the usual practice in this case but simply that he did deviate. It is the fact of the departure from the accepted way of handling such cases which makes

> the officer's conduct arbitrary, and it is the arbitrariness which in this context constitutes the Fourth Amendment violation.

1 W. LaFave, Search and Seizure § 1.4(e) at 120-121 (3d ed. 1996). This Court's decisions confirm that this approach, with its focus on compliance with standard procedures the police set for themselves and assurance that the intrusion would have been made absent any collateral motivation, is correct.

In Abel v. United States, 362 U.S. 217 (1960), the FBI suspected that Rudolf Abel was involved in espionage but lacked probable cause to arrest him. The F.B.I. brought Abel's alien status to the attention of the I.N.S. The I.N.S. determined that Abel was deportable and issued an administrative arrest warrant. This Court characterized pretextual use of administrative warrants as "serious misconduct," id. at 226, but concluded that the I.N.S.'s subsequent arrest of Abel and search of his hotel room were valid based on the district court's factual finding that the conduct of the I.N.S. agents "differed in no respect from what would have been done in the case of an individual concerning whom no . . . information [suggesting espionage] was known to exist." Id. at 227 (emphasis added). That finding was based in part on testimony "that it was 'usual' and 'mandatory' for the F.B.I. and I.N.S. to work together in the manner they did." Id. The Abel decision makes clear that a subjective motive to investigate other offenses cannot "immunize" a defendant from intrusions that would have been made in the normal course on the basis asserted. "[T]he F.B.I. is not to be required to remain mute regarding one they have

reason to believe to be a deportable alien, merely because he is also suspected of one of the gravest of crimes and the F.B.I. entertains the hope that criminal proceedings may eventually be brought against him." Id. at 228-29. Equally importantly, however, Abel indicates that such intrusions are not valid if they would not independently have been made.

In United States v. Robinson, 414 U.S. 218, 221 n.1 (1973), this Court explicitly suggested that "a departure from established police department practice" would be relevant to a pretextual traffic arrest claim but did not need to reach the issue. Robinson had alleged that the officer had "used the subsequent traffic violation arrest as a mere pretext for a narcotics search which would not have been allowed by a neutral magistrate had [the officer] sought a warrant." Id. The Court found it sufficient that 1) Robinson was "lawfully arrested for an offense" (which is essentially all the "could have" courts require); and 2) "the [officer's] placing him in custody following that arrest was not a departure from established police department practice" (as required by the "would have" courts). Id. (emphasis added).

In finding that standard practice was followed, the Robinson Court relied on the same MPD regulations at issue in this case. The Court cited D.C. Metropolitan Police Department General Order No. 3, series 1959 (Apr. 24, 1959), which required the officer to arrest Robinson for the crime of operating a motor vehicle after revocation of permit. Robinson, 414 U.S. at 221 n.1, citing id. at n.2. The Court explicitly "le[ft] for another day questions which

would arise on facts different from these." Id.[25] Here, of course, the officers' action was not only not required by MPD regulations; it was explicitly prohibited.

This Court's decision in United States v. Villamonte-Marquez, 462 U.S. 579, 584 n.3 (1983), does not, as several of the "could have" courts have erroneously concluded, speak to the question in this case. Villamonte-Marquez merely rejected the defendants' argument that customs officers could not rely on a statute allowing suspicionless boarding to inspect a vessel's documentation because they were accompanied by state police and were following a tip that a vessel in the area was carrying drugs. There was no indication (any more than there had been in Abel) that the challenged action departed from standard practice. Nothing in the Court's observation that "'[w]e would see little logic in sanctioning such examinations of ordinary, unsuspect vessels but forbidding them in the case of suspected smugglers,'" id. at 584 n.3 (citation omitted), is at all inconsistent with a "would have" test for pretextual traffic stops. In fact, this statement assumes that the stop would have been made of an "ordinary, unsuspect vessel."

[25] The issue was not presented in the companion case of Gustafson v. Florida, 414 U.S. 260 (1973), because, although there were no comparable police regulations requiring custodial arrest, id. at 265, the defendant in Gustafson did not claim his arrest was pretextual or otherwise unlawful. See id. at 266-267 (Stewart, J., concurring) ("It seems to me that a persuasive claim might have been made in this case that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments. But no such claim has been made."); Robinson, 414 U.S. at 238 n.2 (Powell, J., concurring) ("Gustafson would have presented a different question if the petitioner could have proved that he was taken into custody only to afford a pretext for a search undertaken for collateral objectives").

Under the "would have" test, as under Villamonte-Marquez, whether a traffic stop is valid or invalid depends not at all on whether the vehicle stopped was suspected of another crime.

If the essential purpose of the Fourth Amendment's reasonableness requirement is to protect against arbitrary invasions (Prouse, 440 U.S. at 653-54), whether a particular intrusion violated established police procedure must be part of any "objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time" (Scott, 436 U.S. at 136).

> Protection against arbitrary searches and seizures lies in controlling police discretion, which requires a determination that the police action taken against a particular individual corresponds to that which occurs with respect to other persons similarly situated. Judicial assessment of just what the category is (that is, who else really is "similarly situated") and whether or not like cases in fact receive the same disposition will be more meaningful and reliable if the record in the case reveals a preexisting police regulation on the subject.

Wayne R. LaFave, Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication, 89 Mich. L. Rev. 442, 449 (1990).

As the six dissenters pointed out in the Fifth Circuit's decision in United States v. Causey, 834 F.2d 1179 (CA5 1987) (en banc), this Court's Fourth Amendment decisions have repeatedly turned on whether standard police procedures were followed. Id. at 1187, citing Bertine, 479 U.S. at 372; South Dakota v. Opperman, 428 U.S. 364, 376 (1976). Compare Prouse, 440 U.S. at 650 ("The

patrolman was not acting pursuant to any standards, guidelines, or procedures pertaining to document spot checks promulgated by either his department or the State Attorney General.") with Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 452 (1990) (noting that "the guidelines governing [sobriety] checkpoint operation minimize the discretion of the officers on the scene").

As the Causey dissenters explained: "The emphasis on following standard procedures accords with the principles set forth in Scott. When standard practices . . . are followed, the police are acting in a fashion that is reasonable, objectively viewed, even if they have an ulterior motive." Causey, 834 F.2d at 1187. In short, reasonable officers follow procedure and enforce the laws impartially and uniformly. When action is taken in defiance of police regulations, that objective fact is relevant to the essential Fourth Amendment "reasonableness" inquiry: "[W]ould the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" Terry v. Ohio, 392 U.S. 1, 21-22 (1968).

Here, one of the "facts available to the officers" was that they were forbidden by police regulations from taking traffic enforcement action in all but the most exigent circumstances. In light of that fact, a reasonable officer would not be warranted in believing that the stop of the Pathfinder for a minor civil traffic infraction was "appropriate." Under such circumstances, the "would have" test, consistent with this Court's Fourth Amendment

jurisprudence, condemns the action as arbitrary.[26]

III. THIS TRAFFIC STOP WAS OBJECTIVELY UNREASONABLE BECAUSE -- AS IS TRUE WITH OTHER STOPS THAT FAIL THE "WOULD HAVE" TEST -- ITS INTRUSIVENESS FAR OUTWEIGHED ANY LEGITIMATE GOVERNMENTAL INTEREST IN ACTING CONTRARY TO ESTABLISHED POLICE PROCEDURE.

A. The "Reasonableness" of a Law Enforcement Practice Is Determined by Balancing Its Intrusiveness Against Its Promotion Of Governmental Interests.

"[T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." Prouse, 440 U.S. at 654. The general law enforcement practice at issue in this case is the practice of making traffic stops that are based on probable cause of a technical traffic infraction, but that a reasonable officer in the circumstances would not have made based on that traffic infraction.

As a general matter, the government can hardly assert that it has a strong interest in taking action that is contrary to its own procedures. The government cannot credibly defend a two-tier system, under which certain minor traffic regulations theoretically apply to everyone but, as a matter of practice, are enforced only when the government deviates from its standard policy to target those citizens the police want to stop for some collateral reason not amounting to an objective justification. On the other side of the balance, the subjective intrusion on Fourth Amendment interests

---

[26] As was argued below, petitioners contend that because this stop was not authorized under the applicable police regulations, it fails the "authorization" requirement imposed by some of the "could have" courts and must be invalidated on that ground in any event. See Johnson, 63 F.3d at 246; Scopo, 19 F.3d at 783; Trigg, 878 F.2d at 1041.

is heightened when the government arbitrarily singles out an individual for unusual treatment.

The particular law enforcement practice employed in this case -- the stopping of motorists for minor civil traffic infractions by plainclothes officers in unmarked cars where such stops are specifically prohibited by written police department regulations -- illustrates why stops that would not be made by reasonable officers cannot survive a Fourth Amendment balancing test.

B. The Practice at Issue Does Not Promote Traffic Safety.

The government has a legitimate interest in traffic safety. Prouse, 440 U.S. at 658. But the law enforcement practice at issue in this case does not not promote that interest. To the contrary, the very agency charged with advancing the District of Columbia's interest in traffic safety, the Metropolitan Police Department, has determined through its regulations that in the objective circumstances of this stop, that interest is not substantial enough to warrant the intrusion made here. Cf. Wright v. District of Columbia, 1990 U.S. Dist. LEXIS 7487, *14 (D.D.C. 1990) (ruling high-speed pursuit of traffic violator by unmarked car unreasonable under the Fourth Amendment: "While the District may reasonably have some cars totally unmarked for undercover work, there is no governmental interest in using these cars to pursue garden-variety traffic violators.").

1. The Non-Hazardous Nature of the Violations and Their Classification as Civil Infractions.

The infractions that ostensibly justified the stop in this case are set forth in Title 18 of the District of Columbia

Municipal Regulations (Vehicles and Traffic). Under 18 D.C.M.R. § 2213.4 (1995):

> An operator shall, when operating a vehicle, give full time and attention to the operation of the vehicle.

Under § 2204.3:

> No person shall turn any vehicle to enter a private road or driveway, or otherwise turn a vehicle from a direct course or move right or left upon a roadway without giving an appropriate signal in the manner provided in this chapter if any other traffic may be affected by such movement.[27]

Under § 2200.3:

> No person shall drive a vehicle on a street or highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing.

Each of these offenses is non-criminal, to be adjudicated administratively through the Bureau of Traffic Adjudication. D.C. Code Ann. §§ 40-601, 40-611 through 40-616 (1990 & 1995 Supp.). See Purcell v. United States, 594 A.2d 527, 530 (D.C. 1991). The civil fine for each infraction is $25. 18 D.C.M.R. § 2600.1 (1995).[28]

In Welsh v. Wisconsin, 466 U.S. 740 (1984), this Court held

---

[27] It is not clear that Mr. Brown was required to signal under the terms of this regulation. Because the Pathfinder was facing a T-intersection, there were no approaching cars to be "affected by" its movement. Even assuming there was a vehicle behind the Pathfinder, it would not matter to that car whether Mr. Brown turned left or right. Likewise, because cars travelling on Ely had the right of way (Tr. 59), their movement would not have been affected by a signal from Mr. Brown.

[28] The "unreasonable" speed violation is less serious than a speed violation measured in miles per hour over the posted limit, the penalties for which increase as the speed differential increases. The lowest penalty, for speeding "up to 10 mph in excess of limit," is $30. Id.

that Wisconsin's decision to classify a traffic offense as a noncriminal, civil forfeiture offense, subject to a maximum fine of $200, was "the best indication of the State's interest in precipitating an arrest." Id. at 754. Likewise, the District of Columbia's decision to classify the violations here as civil infractions with a maximum penalty of $25, is the best indication of its minimal interest in stopping vehicles for those violations -- even when such a stop would be permitted by police regulations.

Indeed, MPD regulations provide that traffic enforcement action is to be targeted against those committing "hazardous violations." MPD General Order 303.1(I)(A)(1)(e).[39] The record, including Officer Soto's testimony that the conduct did not justify more than a warning (Tr. 72-73), makes clear that the violations in this case were not "hazardous." Thus, MPD has made the judgment that police enforcement of minor traffic infractions such as those

---

[39] The MPD General Orders are not merely aspirational suggestions for proper police behavior. They are the MPD's "[p]ermanent directive[s] of policy and procedure." MPD Operational Handbook Introduction at 1 (effective January 1, 1991) ("Operational Handbook"). "Failure to obey orders or directives issued by the Chief of Police" is prohibited conduct that "shall serve as the basis for an Official Reprimand or Adverse Action." MPD General Order 1202.1(I)(B)(16) (revised effective May 1, 1991). Absent extraordinary circumstances, the penalty for the first such offense shall range from "[r]eprimand to removal." Id.

These binding orders are the product of extensive review and written comment by "staffing teams" comprising "at least one officer, sergeant, lieutenant, and captain from each sector or branch," who in turn are directed to solicit from other personnel comments on all proposed directives. Operational Handbook 18-19. Thus, the government was correct in Robinson when it referred to MPD General Orders as "the experience of the District of Columbia police force, distilled in the standardized procedure" at issue. Brief for the United States in United States v. Robinson, No. 72-936, at 31.

alleged here does not significantly advance the District of Columbia's interest in traffic safety.

2. The Regulation Prohibiting Officers Not in Uniform or in Unmarked Cars from Enforcing These Violations.

To be sure, the District of Columbia has some interest in enforcing even its most minor traffic regulations. But MPD has made the judgment that, except for a violation that is "so grave as to pose an immediate threat to the safety of others," that interest does not objectively justify a vehicle stop by officers out of uniform or in unmarked cars. MPD General Order 303.1(I)(A)(2)(a)(4) (emphasis in original). The infractions observed here were indisputably outside this very narrow exception (Tr. 72-73).

The MPD's prohibition on traffic enforcement by officers out of uniform or in unmarked cars except in the most exigent of circumstances is a wise one, grounded in the personal security concerns at the heart of the Fourth Amendment. Officers create grave safety risks, both to themselves and the unsuspecting motorist, when they attempt to seize a car and its passengers without the uniforms and equipment that clearly identify them as police. See MPD General Order 308.13(I)(B)(1) ("It is of utmost importance that members of casual clothes/non-uniform units be identified as police officers by the general public, as well as fellow police officers, in their true role so as to prevent false reports, minimize confusion at any crime scene, and eliminate erroneous identification as armed criminals."). Concerns about

carjacking[30] and other crimes against motorists create the potential for dangerous misunderstandings when armed nonuniformed officers attempt to stop motorists. The results of such encounters can be tragic.

In one recent case in New York, a young, foreign-born, pediatric resident took a wrong turn in an unfamiliar part of town and paused to look at his directions. Two plainclothes narcotics officers blocked his path with their unmarked car and approached him, displaying their badges. Apparently unsure of their identity, the doctor put the car in reverse, striking one of the officers. He then drove towards the other plainclothes officer, who shot and killed him. Kim, Family Wants Answers, Newsday, Mar. 20, 1993, at 4. It appears that the motorist in that case had done nothing more serious than fail to "pay full time and attention" in a bad neighborhood. The public interest in deterring such conduct, although technically a traffic infraction, hardly outweighs the public interest in avoiding dangerous confrontations between motorists and ambiguously identified officers.

Even if this Court were inclined to weigh differently the degree to which a seizure such as this one promotes the public interest in traffic safety, it is appropriate in evaluating the

[30] There were 245 carjackings in the Washington area in the first seven months of 1992, including one that drew nationwide attention. Thomas-Lester and O'Donnell, Forces Team Up to Fight Carjacking and Its "Fear Factor", The Washington Post, Oct. 3, 1992, at B1 (discussing Pamela Basu case, in which a local woman was dragged to her death and her baby thrown from her car by two carjackers). After a spate of carjackings about two miles from the site of the Pathfinder stop, the 6th District of the MPD assigned a detective to investigate carjackings full time. Id.

government interest at stake to defer to the District of Columbia's own judgment of the usefulness of a particular enforcement practice. Cf. Sitz, 496 U.S. at 453-54 ("for purposes of Fourth Amendment analysis, the choice among . . . reasonable [enforcement] alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers").[31]

C. The Individual's Interest Under the Fourth Amendment.

1. The Intrusive Nature of Traffic Stops by Non-Uniformed Officers in Unmarked Cars.

This Court has rejected the argument that the Fourth Amendment has nothing to say about how a seizure was made:

> [Such a claim] ignores the many cases in which this Court, by balancing the extent of the intrusion against the need for it, has examined the reasonableness of the manner in which a search or seizure is conducted. To determine the constitutionality of a seizure "[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."

Tennessee v. Garner, 471 U.S. 1, 7-8 (1985), quoting United States v. Place, 462 U.S. 696, 703 (1983). "Because one of the factors is

[31] The D.C. Circuit, like many of the other "could have" courts, refused to consider whether this stop deviated from established police procedure because it wanted to "ensure[] that the validity of the traffic stop 'is not subject to the vagaries of police departments' policies and procedures'" (J.A. 17-18) (citation omitted). But this Court has not hesitated to have the scope of Fourth Amendment protections turn on the content of local police regulations. Under Florida v. Wells, 495 U.S. 1 (1990), whether police are permitted to open containers found during an inventory search turns entirely on whether the police agency at issue has a policy on that subject and whether that policy sufficiently regulates discretion through "standardized criteria" or "established routine." Id. at 4-5.

the extent of the intrusion, it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out." Id. at 8.

In Prouse, this Court considered the physical and psychological intrusions on a motorist's liberty when he is stopped for a random license and registration check, comparing it to the similar intrusions of roving patrol stops by Border Patrol agents struck down in United States v. Brignoni-Ponce, 422 U.S. 873 (1975):

> Both of these stops generally entail law enforcement officers signaling a moving automobile to pull over to the side of the roadway, by means of a possibly unsettling show of authority. Both interfere with freedom of movement, are inconvenient, and consume time. Both may create substantial anxiety.

Prouse, 440 U.S. at 657.

Stops by plainclothes officers in unmarked cars are much more "unsettling" and intrusive because of the element of surprise and uncertainty as to the authority of the persons doing the seizing. They are therefore even more unlike permissible checkpoint stops than the random stops condemned in Prouse: "'At traffic checkpoints the motorist . . . can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion.'" Prouse, 440 U.S. 657 (quoting United States v. Ortiz, 422 U.S. 891, 894-895 (1975)). See also Sitz, 496 U.S. at 453 (noting that sobriety checkpoints were operated by

"uniformed police officers").[32]

Just as an "'unannounced breaking and entering into a home could quite easily lead an individual to believe that his safety was in peril and cause him to take defensive measures which he otherwise would not have taken had he known that a warrant had been issued to search his home,'" 2 W. LaFave, Search & Seizure § 4.8(a) at 599 (3d ed. 1996), quoting State v. Carufel, 112 R.I. 664, 314 A.2d 144 (1974), so too does an attempted traffic stop by a non-uniformed officer in an unmarked car risk the safety of both the officer and the motorist. See supra at __. See also Baker and York, Plan Set to Combat Carjackings, The Washington Post, Sept. 13, 1992, at A1 (quoting American Automobile Association spokesman's statement that motorists are "frightened to the bone" because of carjackings and are threatening to conceal weapons for protection). Of course, not all vehicle stops by unmarked cars are therefore unreasonable, just as not all unannounced entries are unreasonable. See Wilson v. Arkansas, 115 S. Ct. 1914, 1918-1919 (1995). But the additional intrusion on a citizen when he is not given warning of an intrusion is a factor to be weighed against the need for the intrusion under "[t]he Fourth Amendment's flexible requirement of reasonableness" (id. at 1918).

---

[32] This Court has explained that the relevant "subjective intrusion" is "the fear and surprise engendered in law-abiding motorists by the nature of the stop." Sitz, 496 U.S. at 452. While the citizens who are stopped under the D.C. Circuit's test are not technically "law abiding" in that they have presumptively committed some minor traffic infraction, they may well be unaware of it. By definition, the stops at issue here -- those that deviate from police policy -- are unexpected.

2. The Individual's Interest in Being Free From Arbitrary Police Intrusions.

A citizen who is stopped by plainclothes officers in an unmarked car for a minor civil traffic infraction of which he may not even be aware, and for which he would not ordinarily expect to be stopped even by a marked cruiser, suffers the further intrusion of knowing that he has been arbitrarily singled out by law enforcement. This Court in Sitz, noted that the sobriety checkpoint guidelines required that "[a]ll vehicles passing through a checkpoint would be stopped" (496 U.S. at 447) and, in evaluating the subjective intrusion on motorists, considered that the officers "stop every approaching vehicle" (id. at 453). It is always "unsettling" to be pulled over by a police officer, even when one knows in one's heart it is justified. But to be pulled over for no apparent reason, by an officer who has clearly deviated from standard procedure to do so, brings the intrusion to an entirely different level.

The significance of the subjective impact of obvious arbitrariness should not be underestimated. Young black men, long-haired teenagers, out-of-state visitors, and those who make their political views known by means of signs on their bumpers, should not have to wonder what it was about them that made their government target them for arbitrary enforcement. The lasting impact of an apparently arbitrary stop was movingly expressed by an Episcopal priest who was stopped, apparently baselessly, on the New Jersey Turnpike while driving with his college-aged son and godson: "We were left with the nagging question of whether we had been

stopped because we were three black males in a moving van. We had seen the troopers and they had seen us. And if we were stopped for the reason they gave [a report of similar truck swerving], why were we all so shaken by this encounter?" Brown, Highway Confrontation Raises Questions, Washington Diocese at 3 (Oct. 1995).

D. The Balance Weighs In Favor of Petitioners In This Case.

The balance here favors the motorist even more clearly than it did in Prouse. In Prouse, the State of Delaware claimed a strong interest in using discretionary license and registration checks as a means of promoting traffic safety, but this Court concluded:

> The marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure . . . at the unbridled discretion of law enforcement officials.

440 U.S. at 661. This case is easier than Prouse because there is no genuine conflict for this Court to resolve between the government's interest in traffic safety and the Fourth Amendment interests of motorists. The objective evidence -- including the District of Columbia's own police regulations -- refutes any claim that traffic stops like the one made in this case promote its interest in traffic safety. As in Prouse, "the incremental contribution to highway safety" (id. at 659) (if any) of arbitrary stops like this one, does not justify the intrusion visited on those motorists who are singled out in contravention of established police procedure.

The Prouse Court was concerned that:

> To insist neither upon an appropriate factual basis for suspicion directed at a particular automobile nor upon

> some other substantial and objective standard or rule to govern the exercise of discretion "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches . . . "

Id. at 661 (quoting Terry, 392 U.S. at 22). This Court has never had to decide whether an allegedly pretextual factual basis is an "appropriate factual basis" where a reasonable officer would not have relied upon it to make the stop. But the Court's concern in Prouse that, in the absence of a traffic violation, "we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver" (id.), is equally applicable here. As petitioners have shown, merely requiring a technical traffic infraction does not, as a practical matter, constrain the discretion of the officer in the field. Where the objective evidence shows that such discretion has been used arbitrarily -- where an officer has acted in contravention of established police practice -- the stop is not reasonable.

The clear language of the Fourth Amendment requires the reasonableness standard embodied in the "would have" test. The D.C. Circuit's ruling precludes any judicial inquiry into the Fourth Amendment reasonableness of automobile stops whenever the police can claim probable cause of an infraction. While the vast majority of such stops are clearly reasonable, the Fourth Amendment demands that courts have the authority to review and invalidate those few stops that are not objectively reasonable -- particularly since for every one such stop that a judge sees, there are many

other innocent motorists who have suffered similar intrusions. Here, the district judge suggested that she did not consider the officers' actions appropriate under the circumstances ("[the stop] may not be what some of us believe should be done, or when it should be done, or how it should be done") (J.A. 5), but felt constrained to uphold the stop as long as the officers had witnessed some -- any -- technical traffic violation. When a stop prompts a court to question its "what," "when" and "how," the court should not be precluded from looking at the totality of the objective circumstances of the stop in deciding whether it was reasonable. The "would have" standard does not interfere with legitimate police conduct. But it does give courts the authority to strike down those traffic stops -- like this one -- that are arbitrary and unreasonable.

CONCLUSION

The police violated the Fourth Amendment when they unreasonably seized the vehicle in which petitioners were riding. The trial court erred in refusing to suppress the fruits of that seizure, including all of the contraband seized after the stop. Petitioners respectfully request that this Court reverse the judgment of the Court of Appeals for the District of Columbia Circuit, and remand for entry of an order vacating petitioners' convictions and suppressing all evidence seized as a result of the unconstitutional seizure in this case.

Respectfully submitted,

A.J. KRAMER

Federal Public Defender
NEIL H. JAFFEE
LISA BURGET WRIGHT*
Assistant Federal Public Defenders
625 Indiana Avenue, N.W.
Suite 550
Washington, D.C. 20004
(202) 208-7500
Counsel for Petitioner Whren

G. ALLEN DALE
307 G Street, N.W.
Washington, D.C. 20001
(202) 638-2900
Counsel for Petitioner Brown

February 16, 1996

*Counsel of Record

ADDENDUM

Metropolitan Police Department □ Washington, D.C.

GENERAL ORDER

Subject:	Series	Number	Distribution	Change Number
Traffic Enforcement	303	1	A	1
	Effective Date: April 30, 1992			
	Revision Date:			

The purpose of this order is to establish the policy and procedures for carrying out an effective traffic enforcement program. This order consists of the following parts:

PART I Responsibilities and Procedures for Members of the Department

- A. Objectives and Policies.
- B. Summary Arrests.
- C. Notices of Infractions (NOI's).
- D. Warning NOI's.
- E. NOI's issued to Postal Service Employees.
- F. Traffic Violations by Other Operators of Government Vehicles.
- G. Enforcement of Pedestrian Regulations.
- H. Enforcement of Public Regulations.
- I. Enforcement of Traffic Regulations Pertaining to the Operators of Bicycles.
- J. Enforcement of the Parking Regulations.
- K. Enforcement of the 72 Hour Parking Restriction.
- L. Department of Administrative Services' Parking Lots.
- M. Enforcing Violations of Excessive Smoke.
- N. Information to be Furnished the Motor Vehicle Inspection Stations Concerning Vehicles Conveyed There for Inspection by Members.
- O. Enforcement of Moped Regulations.
- P. Traffic School Information.
- Q. Processing Citizens' Complaints Relative to Motorists Illegally Passing Stopped School Buses.
- R. Congressional Tags.
- S. Elected City Officials.
- T. Military Personnel.
- U. Use of Radar Equipment.

PART II Responsibilities and Procedures for Special Assignment Personnel

- A. Station Clerks.
- B. Traffic Enforcement Branch Personnel, Special Operations Division.

PART III Responsibilities and Procedures for Supervisory and Command Personnel

- A. Commanding Officer, Traffic Enforcement Branch, Special Operations Division.
- B. District Commanders.
- C. Patrol Operations Officer.

PART I

A. Objectives and Policies.

This department's traffic enforcement policies and objectives are as follows:

1. Objectives.

   a. To prevent traffic accidents;

   b. To promote greater traffic safety awareness by the public;

   c. To facilitate the efficient flow of traffic;

   d. To ensure the convenience and safety of all users of public roadways including pedestrians, bicyclists, and motorists;

   e. To target enforcement activities against those committing hazardous violations;

   f. To selectively enforce the Traffic Regulations, (DCMR, Title 18, Vehicles and Traffic) in proportion to the occurrence of traffic accidents or citizen complaints;

   g. To implement the selective enforcement policy with respect to time, place, frequency, and type of violation; and

   h. To assist employees of the Department of Public Works (DPW in the District of Columbia Parking Enforcement Program.

2. Policies.

a. Traffic enforcement action may be taken under the following circumstances:

(1) By on duty uniformed members driving marked departmental vehicles; or

(2) By off duty uniformed members driving marked departmental vehicles while participating in the department's take home cruiser program; or

(3) By on duty uniformed members of the Public Vehicle Enforcement Unit, Traffic Enforcement Branch operating unmarked departmental vehicles; or

(4) Members who are not in uniform or are in unmarked vehicles may take enforcement action only in the case of a violation that is so grave as to pose an immediate threat to the safety of others.

b. In each instance of a stop for a traffic violation, the member shall:

(1) Issue either a Notice of Infraction (NOI); or

(2) Issue a Warning NOI; or

(3) Under extreme circumstances an oral warning may be given (e.g., receipt of a radio assignment requiring immediate response, or the motorist was enroute to a hospital for emergency treatment of a sick or injured passenger).

c. On-duty members shall not:

(1) Conceal themselves from the view of the public for traffic enforcement purposes; or

(2) Park department vehicles in such a manner that will impede the flow of traffic or create hazardous conditions.

d. This order does not supersede the provisions of either law or departmental orders pertaining to persons who have either Congressional or diplomatic immunity.

e. Members are expected to be courteous and polite when making stops for either traffic or pedestrian violations. Members shall:

(1) Identify themselves and their element;

(2) Inform the motorist why he/she has been stopped; and

(3) Not enter into discussions with citizens over the legality or justification for the citation or arrest.

B. Summary Arrests.

1. Members shall make summary arrests and prepare NOI's for the following offenses:

a. Reckless driving;

b. Leaving the scene after colliding, with personal injury and property damage;

c. Driving under the influence of intoxicating liquor or drugs;

d. Operating without a valid permit;

e. Operating after suspension or revocation;

f. Operating over 30 mph in excess of the posted speed limit;

g. Failure to surrender permit after suspension or revocation; and

h. Smoke screens.

2. When members stop motor vehicles for a minor traffic violation and the operator of the motor vehicle exhibits a recently expired operator's permit, the member:

a. May issue the operator an NOI for "No Permit" or "No D.C. Permit;" and

b. Shall not summarily arrest the operator of the vehicle if it appears that the operator has through oversight, allowed the permit to expire.

3. Members shall make a summary arrest for "No Permit" or "No D.C. Permit" where no operator's permit has been issued or the permit has been expired for more than 90 days. Before the operator of the vehicle is released, the member shall advise the operator:

a. That until renewal he/she cannot legally operate a motor vehicle in the District of Columbia; and

b. That only a validly licensed operator or tow truck operator can remove the vehicle from its present location.

4. When members stop motor vehicles for minor traffic violations and the operator fails to exhibit an operator's permit but states that he/she does have one, the member shall check WALES to verify that a permit has been issued and is still valid.

5. In the event that WALES is not in operation, members shall:

a. If inquiring from his/her element, contact the Telecommunication Operations Branch, Communications Division, by telephone, and request that the subject's identifying information be run through the Department of Public Works, Transportation Systems Administration Computer Network (information such as partial spelling of the person's first, middle and last name and his/her approximate date of birth will help identify the individual); or

b. If inquiring via radio communications, contact the Communications Division dispatcher who will in turn, contact the Telecommunication Operations Branch for assistance.

6. When an operator's permit status cannot be verified through the Communications Division dispatcher or the Telecommunication Operations Branch personnel, members shall:

a. Summarily arrest the operator for "No Permit;"

b. Transport the operator to the arresting member's element or closest element; and

c. Have the operator processed.

7. If the operator has been issued a permit which is still valid, the member shall issue the operator an NOI for "Failure to Exhibit a Permit" in addition to NOI's for any other infraction which the operator may have committed. The operator may be permitted to continue to operate the vehicle.

8. When it is determined that the arrestee does in fact, have a valid driver's permit and he/she has already been arrested for "No Permit," the member shall:

a. Immediately initiate the procedures for placing a person on the Detention Journal, set forth in General Order No. 502.5 (Detention Journal); and

b. Issue the arrestee an NOI for "Failure to Exhibit a Permit."

9. When a person is stopped for a traffic violation and a WALES check reveals that there is an outstanding Superior Court warrant on file, the member shall place the violator under arrest and arrange for him/her to be transported to the nearest district station where the WALES check can be verified and the appropriate action taken. A "Hit" on an out-of-state warrant should be verified with the entering agency prior to arrest, as outlined in General Order 302.6 (WALES).

10. When a member stops a motorist for a traffic violation and it is determined that there is a suspension or revocation order pending against the motorist, the issuing member shall:

a. Complete a DOT Form 33-40 (Official Notice of Proposed Suspension);

b. Request the signature of the person to be served and issue the pink copy to the operator. Should the operator refuse to sign the Official Notice of Proposed Suspension, enter the word "Refused" in the space provided for the operator's signature. The operator shall not be summarily arrested for refusing to sign the notice; and

c. Release the operator after the appropriate police action has been taken.

11. Members who make summary arrests or issue NOI's for the following offenses shall submit a PD Form 31 (Report to DOT for Flagrant Violations), in triplicate, to the Chief of Police, who will then forward it to the Director, Department of Public Works:

a. Homicide, operation of motor vehicle involved;

b. Reckless driving-involving bodily injury;

c. Physically unqualified to drive an automobile;

d. Lending of one's DC Permit;

e. Charged with a felony, motor vehicle involved;

f. Offenses tending to reflect on character of a taxi cab operator (Hacker);

g. Colliding and failing to stop;

h. Speed, 30 MPH or more in excess of posted speed limit;

i. Excessive smoke or defective exhaust;

j. Permitting an unlicensed operator; and

k. Any other flagrant traffic violation which the member feels should be called to the immediate attention of the Director, Department of Public Works.

C. Notices of Infractions (NOI's).

In addition to those offenses requiring summary arrests in Part IB, an NOI shall also be issued for any offense which in the prudent judgement of the issuing member exhibited a flagrant disregard for the law and was likely to cause an accident or endanger the safety of pedestrians, bicyclists, or other motorists.

D. Warning NOI's.

1. Members may issue Warning NOI's for offenses that do not require the summary arrest of the motor vehicle operator.

2. Members shall not issue a Warning NOI to a motorist who has:

a. Committed a Right Turn on Red Offense;

b. Committed an offense which caused an accident;

c. Failed to Yield the Right of Way to a Pedestrian; or

d. Committed any parking violation.

3. The decision as to whether to issue the motorist a Warning NOI or an NOI shall be based upon the sound judgement of the member making the traffic stop.

E. NOI's issued to U.S. Postal Service Employees.

In dealing with operators of vehicles of the Postal Service, members shall bear in mind that movement of the mail shall not be unduly delayed; however, U.S. Postal employees are required to obey the law and have no immunity from arrest.

1. The U.S. Postal Service has requested that moving traffic violations committed by operators of their vehicles be reported. In cases where enforcement action is taken by members of this department against operators of Postal Service vehicles, members shall:

a. Complete a PD Form 101 (Report of Violation of the Traffic Regulations by Operators of Vehicles Owned by the District of Columbia or the U.S. Government) in duplicate and distributed as noted.

b. If the operator of a vehicle is transporting U.S. Mail, the member shall expedite the transaction and shall not detain the operator any longer than absolutely necessary to secure the pertinent information for the completion of the citation and the PD Form 101.

2. Whenever a member wishes to speak with, serve a summons upon, or arrest an employee of the U.S. Postal Service at the Main Post Office, he/she shall contact the Director, Employees and Labor Relations, U.S. Postal Service, on weekdays between 0800 and 1700 hours (at other times, the Postal Inspector in charge may be contacted for this purpose).

3. If it becomes necessary to arrest an operator of a vehicle carrying mail on the street, the member shall:

a. Immediately notify the Inspector in charge, Postal Inspector's Office, U.S. Postal Service, in order that someone may respond to take charge of the mail and the vehicle; and

b. Take all necessary precautions to protect the mail.

4. If the operator of a postal vehicle violates the law or Municipal Regulations and flees into the City Postal Service Building or garage, the member will not be interfered with in effecting his/her arrest provided the member is able to apprehend the employee before he/she is able to exit the postal vehicle, or go beyond the immediate vicinity of the vehicle.

Note: If the member is a plainclothes officer and the circumstances permit, he/she should stop at the guard's office or post and be identified prior to taking any further action.

5. Members must contact the tour superintendent on duty if the employee should flee into any other part of the Postal Service Building. The tour superintendent will see that the employee in question is brought to the member or that the member is taken to the employee.

F. Traffic Violations by other Operators of Government Vehicles.

Whenever the operator of a motor vehicle bearing District of Columbia or U.S. Government license plates or a vehicle otherwise identifiable as being owned by either government is arrested for a traffic violation or is involved in an accident and it appears that the operator is at fault, the member handling the incident shall prepare a PD Form 101 as noted and follow the distribution schedule the morning following the day the case is disposed of in court.

G. Enforcement of Pedestrian Regulations.

Uniformed members of the force shall be responsible for the enforcement of all traffic laws and regulations pertaining to pedestrians. Primary emphasis shall be placed on those offenses where the pedestrian, through violation of existing statutes, creates a danger to himself, other persons, or the motoring public.

1. A separate criminal sanction is applicable in situations where a pedestrian violator refuses or fails to inform a member of his/her true name and address to facilitate proper issuance of an NOI.

2. Pedestrian violators shall not, however, be required to produce or display documentary evidence of identity unless the name and address furnished to the member at the time of the stop is known to be, or is reasonably suspected of being, fictitious. In this instance, members shall:

a. Caution the pedestrian that continued refusal(s) to provide correct identity could result in the violator's arrest; and

b. Issue an appropriately completed NOI for "Failure to Make Proper Identity Known," a Superior Court charge, should an arrest become necessary.

Note: Absent articulable facts and circumstances supporting an member's belief that a pedestrian violator is intentionally providing false or fictitious information, the citizen's verbal disclosure of identity must be accepted.

3. Pedestrian violations involving juveniles under the age of 16 shall be processed according to the procedures set forth in General Order 305.1 (Handling Juveniles).

4. Warning NOI's may be issued for pedestrian violations when, in the judgement of the issuing member, a warning NOI rather than an NOI is appropriate.

a. All appropriate spaces of the NOI shall be completed; and

b. The word "WARNING" shall be written in the space for indicating the amount of collateral.

H. Enforcement of Public Vehicle.

It is the responsibility of all uniformed members on patrol to enforce the public vehicle regulations.

I. Enforcement of the Traffic Regulations Pertaining to the Operators of Bicycles.

Bicycle operators are required to comply with applicable traffic regulations. Uniformed members of the force on patrol shall enforce the traffic regulations pertaining to bicycle operators, giving particular emphasis to violations which at that time and place, unduly impede or obstruct traffic or endanger the bicycle rider or other persons.

J. Enforcement of the Parking Regulations.

Uniformed members on patrol shall enforce the parking regulations, giving primary attention to the more serious parking infractions (e.g., rush hour violations, obstructing fire hydrants, parking in alleys, and those parking violations which may contribute to an accident).

K. Enforcement of the 72 Hour Parking Restrictions.

Whenever it is brought to the attention of members of the department that a vehicle is reportedly parked in violation of the 72-hour restriction, the investigating member shall:

1. Check WALES for a stolen or wanted report on the vehicle.

   a. If the vehicle has been reported stolen or has a want status (e.g., use in a robbery holdup, kidnapping or recovered), the vehicle shall be impounded pursuant to General Order 601.1 (Recording, Handling and Disposition of Property Coming into the Custody of the Department);

   b. If it is determined that the vehicle is not wanted, the member shall prepare PD Form 866 (Overtime Parking Sticker). The PD Form 866:

      (1) Has an adhesive back designed to stick on a rubber surface (the card containing the PD Form 866 shall be carried in back of the NOI Book); and

      (2) Shall be placed on the tire tread so as to be readily visible to investigating members.

2. Whenever a member prepares an NOI based upon the information contained on the PD Form 866, he/she shall record the pertinent facts on the back of the number one copy of the citation.

L. Department of Administrative Services Parking Lots.

The Department of Administrative Services (DAS) has under its control and jurisdiction a number of parking lots used by government personnel. Some DAS officers are authorized to write parking citations while others will require assistance from the MPD. The following is the procedure to be followed in dealing with parking violations on DAS property:

1. A member who receives an assignment to assist DAS officers with parking violations shall note the name of the DAS officer/complainant on the back of the citation and issue the NOI and/or impound the vehicle.

2. In the event the violator chooses to appear at the Bureau of Traffic Adjudication hearing, the member shall summons the complainant as a witness.

M. Enforcing Violations of Excessive Smoke.

1 Whenever an NOI is issued for excessive smoke on a vehicle, the issuing member shall prepare (in addition to the NOI), a PD Form 31 (Report to the Director, Department of Transportation for Flagrant Traffic Violations) in triplicate

   a. The PD Form 31 is not to be issued to the violator;

   b. All copies of the PD Form 31 and the first and third copies of the NOI shall be turned in to an official at the expiration of the member's tour of duty (If the operator to whom an NOI is issued is not the owner of the vehicle, the owner of the vehicle in violation may also be issued an NOI if he/she knowingly permitted the vehicle to be operated in violation); and

   c. The Department of Public Works will then issue a notice directing the owner to submit his/her vehicle for inspection within 72 hours.

   Note: In doubtful or borderline cases, members of the force shall not issue NOI's, but shall prepare a PD Form 31 so the vehicle may be inspected by the appropriate authority.

2. When persons elect to appear at the Bureau of Traffic Adjudication hearing to contest excessive smoke charges, arrangements shall be made by the issuing member for a motor vehicle inspector to appear as a witness for the government. This can be accomplished by contacting the Chief Inspector, Vehicle Section, Department of Public Works.

N. Information to be Furnished the Motor Vehicle Inspection Stations Concerning Vehicles Conveyed There for Inspection by Members.

1. When a member of this department causes a motor vehicle to be presented to a District of Columbia Motor Vehicle Inspection Station for examination, he/she shall furnish, or cause to be furnished to the inspector in charge, the following information:

   a. The name and address of the owner and/or operator;

   b. The purpose of the inspection; and

   c. The name and element of the member initiating the action.

2. Upon completion of the inspection and the owner and/or operator is not present to take possession of the motor vehicle, members shall comply with the provisions of General Order 601.1 (Procedures for Handling Property).

O. Enforcement of Moped Regulations.

1. The District of Columbia Motorized Bicycle Act, D.C. Law 1-110 defines a "Motorized Bicycle" (moped) as a motor vehicle with:

a. Two or three wheels;

b. A seat;

c. An automatic transmission; and

d. An engine no larger than 50 cubic centimeters capable of producing no more than 1.5 horsepower or a maximum speed of 25 mph.

2. Mopeds operated within the District of Columbia are considered motor vehicles, and as such, fall within the scope of the District law that forbids the operation of a motor vehicle without the permission of its owner. The application of D.C. Code 22-2204 (Unauthorized Use of Vehicles) also applies when an arrest is made for the unauthorized use of a moped.

3. Out-of-state moped operators who have complied with the law of their state need not register their moped in the District (District residents must register their mopeds). The States of Maryland and Virginia do not require mopeds to be registered.

4. All operators of mopeds from Maryland and the District of Columbia must have a permit. Operators of mopeds from states which do not require a license may operate a moped in the District of Columbia without a license.

5. The following rules apply to mopeds operated in the District of Columbia:

a. No helmet is required;

b. No insurance is required;

c. A moped may be parked like a bicycle;

d. Operators must obey all motor vehicle rules;

e. The operator must be at least sixteen years of age;

f. Mopeds may not be operated on any sidewalk, off-street bike path, or bicycle route unless motor vehicles are allowed;

g. Mopeds may be operated on any part of a roadway designated for the use of bicycles; and

h. All mopeds registered in the District must be inspected once every three years; rental mopeds must be inspected annually.

6. Any individual operating an unregistered moped in the District of Columbia that is required to be registered shall be cited for "Using or Permitting Use of Unregistered Vehicle." The operator shall be allowed to proceed but the moped shall not be allowed to be operated. Members impounding mopeds shall utilize the services of their district's motorscooter trailer.

a. The moped may be impounded for safekeeping (no impoundment fee); or

b. Operated after it has been registered.

7. NOI's shall be issued to mopeds and operators of mopeds for violations of the DCMR, Title 18, "Vehicles and Traffic."

P. Traffic School Information.

1. A citizen who receives a moving violation may elect to attend Traffic School in lieu of receiving points against his/her license under the following circumstances:

a. When he/she is referred by the Superior Court, or the Corporation Counsel's Office, Superior Court; or

b. When he/she is referred by the Bureau of Traffic Adjudication.

2. Unless referred by Superior Court or BTA, violators are ineligible for Traffic School.

3. Violations for which forfeiture of collateral is not permitted (e.g., driving under the influence, hit and run, etc.), will make the offender ineligible for Traffic School unless referred by the Superior Court.

4. Within fifteen (15) days of the date of issuance, the violator must pay the fine at the Bureau of Traffic Adjudication Cashier's Office, 65 K Street N.E. (for BTA charges) and request a Bureau of Traffic Adjudication hearing; or at the D.C. Finance Office for the Superior Court, 500 E Street N.W. (Superior Court charges).

5. Upon disposition of the traffic case the violator must, within five (5) days, appear in person at the Traffic Enforcement Branch (excluding Sundays and holidays), to register for Traffic School.

6. A listing of the names of all persons registered for Traffic School (together with the NOI number and the completion date of the scheduled class) shall be compiled daily by the Traffic Enforcement Branch, Special Operations Division and forwarded to the Bureau of Traffic Adjudication for entry and updating of pertinent data into computer systems.

7. In order to complete the course, the violator must attend each of the scheduled classes. He/she must report at the scheduled time and place and present his/her ATTENDANCE CARD (PD 200B):

a. The ATTENDANCE CARD is stamped at the end of each session; and

b. At the end of the final session, test scores and the signature of the Commander, Traffic Enforcement Branch is affixed to certify that the violator has successfully completed the course (this constitutes final disposition of the traffic case).

Q. Processing Citizens' Complaints Relative to Motorists Illegally Passing Stopped School Buses.

1. When a citizen (including a school bus driver) reports that he/she has witnessed a vehicle illegally pass a stopped school bus with its warning lights activated, the member taking the report shall:

a. Prepare a PD Form 251 (Event/Offense Report) and a PD Form 252 (Supplement Report) on each reported occurrence. The PD Form 251 report shall include:

(1) The license tag number and description of the offending vehicle;

(2) Any physical description of the motorist operating the offending vehicle; and

(3) A notation concerning whether the witness believes himself/herself able to identify the motorist.

b. The PD Form 252 (Supplement Report) shall include the name, address, and telephone number(s) (home/work) of each person witnessing the incident.

2. Prior to the end of the tour of duty, the member taking the complaint from the citizen shall present the PD Forms 251, 252, and other relevant documents to the watch commander.

3. The watch commander shall ensure that the incident is referred to the Traffic Enforcement Branch, Special Operations Division, within twenty-four hours.

a. The originals of the PD Forms 251 and 252 shall be forwarded to the Information Processing Section, Data Processing Division; and

b. A copy will be forwarded to the Traffic Enforcement Branch, Special Operations Division.

R. Congressional Tags.

This order is not intended to supersede the provisions of the law pertaining to persons who have Congressional immunity.

1. Members of the force are reminded that Title 40, Chapter 7, Section 703 of the District of Columbia Code provides for the issuance of Congressional tags to members of Congress and other selected individuals connected with Congress for their official use which, when used by them while on official business, shall authorize them to park their automobiles in any available curb space in the District of Columbia except within fire plug, fire house, loading station, and loading platform limitations.

2. The Congressional tags referred to above are issued by the Department of Public Works and are made of metal. The tag is made to be attached to the regular vehicle license plate and indicates the current session of Congress with further identification of "H" or "S" followed by a number.

S. Elected City Officials.

Elected city officials are required to attend many meetings and functions throughout the day and evening on a city-wide basis, therefore, it is the department's policy to take this into consideration and extend to them the same courtesies afforded members of Congress relative to parking infractions.

T. Military Personnel.

1. The Department of Public Works does not recognize operator's permits issued by military units or facilities as valid.

2. Active members of the Armed Forces exhibiting expired operator's permits from jurisdictions that extend the actual permittee's expiration to coincide with the date of the member's discharge shall:

a. Not be issued an NOI for "No D.C. Permit;" and

b. Be permitted to continue the operation of their motor vehicle.

3. Active members of the Armed Forces who possess a District of Columbia operator's permit shall be required to maintain a valid permit at all times while operating a motor vehicle in the District of Columbia.

U. Use of Radar Equipment.

1. Only members who are trained and currently certified in the use of radar equipment shall be permitted to operate radar devices and issue radar speed NOI's.

2. Radar equipment shall be used only at those locations where the justification for its use can be demonstrated (e.g., locations where accidents occur frequently, school zones, or locations where speed is a contributing factor to accidents). Radar may also be used at locations selected at the discretion of a supervisory official.

3. When choosing a location to conduct radar speed measurements, members shall ensure that the flow of vehicular and pedestrian traffic will not be impeded or obstructed.

4. Members shall wear the visibility vest when operating radar equipment during hours of reduced visibility.

5. Members operating radar equipment are to complete a PD Form 715 (Radar Enforcement Record) for each location worked. This form shall be turned in at the end of the member's tour of duty.

6. When a member stops a vehicle and the operator has a device used to detect or counteract police radar in his/her possession, the member shall:

a. Issue the motorist a PD Form 61D (Violation Citation) and list the collateral as fifty ($50.00) dollars;

b. Confiscate the radar detection device;

c. Complete a PD Form 251 (Event Report) classifying the event as an incident for reporting purposes and include all pertinent facts surrounding the incident; and

d. Complete a PD Form 81 (Property Record) and place the radar detection device on the Property Book as evidence.

e. When collateral is posted and forfeited, the radar detector shall be released to the owner with specific instructions to immediately remove the device from the District of Columbia.

7. If the vehicle has a factory installed radar device mounted in the dashboard, the member shall make no attempt to seize the device or impound the vehicle. The member shall determine the device to be operational, issue the motorist a PD Form 61D, make note of the device's name, location, model and serial number for use in court.

Note: A motorist shall not be summarily arrested exclusively for possession of a radar detection device.

PART II

A. Station Clerks.

The original and one copy of PD Form 31 shall be forwarded to the Office of the Chief of Police no later than the following business day for transmittal to the Director, Department of Public Works (one copy shall be filed at the forwarding organizational element).

B. Traffic Enforcement Branch Personnel, Special Operations Division.

Upon being assigned a complaint by a citizen that a motorist has illegally passed a stopped school bus, the member shall:

1. Ensure that a PD Form 119 (Complaint/Witness Statement) has been completed, and that the statement includes:

a. The time, date, and place of the occurrence;

b. A description of the motorist, if possible; and

c. The complainant's signature.

2. Attempt to contact and interview the owner of the offending vehicle to determine the operator at the time of the occurrence. Once the operator of the offending vehicle has been identified, the member shall:

a. Interview the operator; and

b. Take appropriate enforcement action which may include issuing an NOI (A notation as to why the NOI was written, i.e., complaint, investigation, shall be made on the reverse side of copy "A" along with any other pertinent information).

PART III

A. Commanding Officer, Traffic Enforcement Branch, Special Operations Division.

1. The Commanding Officer, Traffic Enforcement Branch, Special Operations Division, shall coordinate and periodically meet with the district commanders relative to traffic problems within their respective districts with a view toward assuring the safe and efficient movement of traffic. More specifically, he/she shall:

a. Indicate the selective enforcement action needed to remedy the situation;

b. Provide operational support for district enforcement activities where special skills or specialized equipment are needed such as radar enforcement, investigation of serious accidents, etc;

c. Provide data on high accident frequency areas and causative violations to element commanding officers on a regular basis to assist in their selective enforcement efforts; and

d. Provide data comparing enforcement efforts to accident occurrence in relation to time, place, and violation.

2. Assign all complaints of motorists illegally passing a stopped school bus for further investigation.

B. District Commanders.

District Commanders shall:

1. Enforce all traffic regulations.

2. Ensure controlled and unobstructed traffic flow.

3. Monitor arterial roadways and bridges at all times with particular attention given during rush hour periods.

4. Ensure that only trained and currently certified members operate radar and issue Notices of Infraction for speeding violations.

5. Frequently consult with the Commanding Officer, Traffic Enforcement Branch relative to traffic conditions and enforcement efforts within their respective districts.

6. Submit a PD Form 107 (Outside Agency Report) to the Director, Department of Public Works, when traffic signs conflict or are obsolete.

7. Discuss the subject of courtesy at least once each week at roll calls (supervisors shall emphasize the need for courtesy at all times and shall take remedial action as necessary).

8. Ensure that 30% of all roll call training is traffic enforcement related.

9. Ensure that members of their command submit FL 140 (Monthly Report of Traffic Enforcement Activities) reports in an original and three (3) copies.

a. The original and two copies shall be forwarded to the Commander, Special Operations Division (so as to arrive no later than the fifth (5th) day of the following month); and

b. The third copy shall be retained in file at the originating element for one year.

10. Ensure that members of their command submit FL 140-A (Weekly Reports of Notices of Infraction) reports in an original and three (3) copies.

a. The original and two copies shall be forwarded to the Chief of Police, through the Patrol Operations Officer, so as to arrive no later than Tuesday of the following week; and

b. The third copy shall be retained in file at the originating element for one year.

C. Patrol Operations Officer.

The Patrol Operations Officer shall assume overall responsibility for traffic conditions within the District of Columbia.

Isaac Fulwood, Jr.

Isaac Fulwood, Jr.
Chief of Police

IF:RMD:jtp